76-1016

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

WARDEN, GREEN HAVEN STATE PRISON,

Petitioner,

against

THOMAS PALERMO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, the Warden of Green Haven State Prison, Stormville, New York, prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit in the case of *Thomas Palermo, et ano.* v. *Warden, Green Haven State Prison, et al.*, which granted respondent a writ of habeas corpus.

Opinions Below

The decision of the Court of Appeals is not yet reported and was dated November 1, 1976. The opinion of the Court of Appeals is reproduced as Appendix "A". The final decision of the District Court, which was affirmed by the Court of Appeals, is reported at 412 F. Supp. 935. The opinion of the District Court is reproduced as Appendix "B". An earlier decision of the District Court is reported at 323 F. Supp. 478 and is reproduced as Appendix "C".

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The decision of the Court of Appeals was handed down on November 1, 1976.

Questions Presented

1. Whether a plea bargain in which stolen property is a primary consideration is a valid and enforceable plea bargain within the meaning of *Santobello* v. *New York*, 404 U.S. 257 (1971)?

2. Whether a local state prosecutor's *ultra vires* promise made in plea bargaining, which promise invades and usurps the prerogatives and powers of other independent governmental agencies and jurisdictions, can form the basis of a valid specifically enforceable plea bargain within the meaning of *Santobello* v. *New York*, 404 U.S. 257 (1971)?

Statement of the Case

A. Facts

Respondent Thomas Palermo was scheduled to stand trial in Richmond County, New York on February 17, 1969, for an armed robbery that had occurred in Richmond County. Mr. Palermo and his co-defendant, who were out on bail, arrived late for trial. The same morning, in Queens County, New York, an armed robbery of the Provident Loan Society occurred in which some $4,000,000 worth of jewels were stolen.

Palermo and his co-defendant, Mr. Saltzman, were found guilty in the Richmond County robbery in February, 1969, after a jury trial. They remained in custody pending sentence in that case.

Both Palermo and his co-defendant soon thereafter became suspects in the robbery of the Provident Loan Society in Queens County. They were arrested for the crime in May, 1969, while still awaiting sentence on the Richmond County conviction.

Around this time a long series of negotiations began for the return of the jewelry. The principal participants in the negotiations were Mr. Palermo, his lawyers, members of the Queens County District Attorney's office, and several lawyers from a law firm which represented the interests of the victim Provident Loan Society and its insurer. In the negotiations, Palermo sought to withhold or conceal the $4,000,000 worth of stolen jewels in exchange for numerous considerations involving primarily a substantial reward for Palermo and favorable dispositions on Palermo's criminal cases in three separate counties, in particular Palermo's judgment of conviction and sentence in Richmond County.

Palermo and his co-defendant were sentenced in Richmond County on June 27, 1969. Palermo received a sentence of zero to twenty-five years and Mr. Saltzman received a sentence of zero to fifteen years.

The negotiations, meanwhile, continued. Eventually a final "deal" was reached on October 24, 1969. The precise terms of the deal were subsequently disputed by the parties. According to Palermo, in exchange for his cooperation in returning the jewels the Queens County District Attorney promised him (1) parole on his twenty-five year Richmond County sentence after one year in jail; (2) a suspended sentence or unconditional discharge following a plea of guilty to the Queens County jewel robbery charge; (3) dismissal of an unrelated assault case pending against Palermo in Queens County; and (4) an unconditional discharge or suspended sentence following a plea to a misdemeanor in a case pending against Palermo in Oneida County, New York. A provision for a $100,000 reward for Palermo was dropped at the last minute; Palermo was later to claim that he had been "defrauded" out of the stolen jewelry which was rightfully his.

According to one of Mr. Palermo's former attorneys, Jacob Evseroff, a representative of the Queens District Attorney's office, Mr. Ludwig, promised Evseroff, *inter alia*, to make a recommendation to the Parole Board for early parole for Palermo on the Richmond County sentence. Mr. Ludwig told Evseroff that Palermo would have to do at least one year on the sentence before parole. At the time Mr. Evseroff did not even represent Palermo, having been previously discharged.

According to Palermo, the attorney who replaced Mr. Evseroff, one Mr. Edward Bobick, told Palermo that Evseroff in giving his version of the deal had been lying. Palermo subsequently called Evseroff back for an explanation and Evseroff told Palermo that in fact it was Bobick who was lying. Palermo eventually decided to keep his faith in Bobick, who represented him throughout the final negotiations.

According to the Queens District Attorney and its representative, that office promised only to recommend leniency for Palermo before the Parole Board and did not guarantee parole after any specific period of time. The Queens District Attorney's office also promised to recommend favorable dispositions in Palermo's other criminal cases, including the Queens jewel robbery case itself.

Shortly before the final agreement was reached on October 24, 1969, several lawyers representing the insurer-victim and a representative of the Queens District Attorney's office met with a member of the State Board of Parole, Mr. Howard Jones. The purpose was to discuss the possibility of early parole for Mr. Palermo on his twenty-five year Richmond County sentence. Mr. Jones made no commitment on behalf of the Board at this meeting. Nonetheless, Mr. Bobick sent Palermo a "congratulations" telegram saying that the meeting had been successful and that a commitment had been obtained from the Parole Board to parole Palermo after one year. Bobick, however,

was not present at this meeting with parole commissioner Jones.

After the conclusion of the alleged plea bargain, Palermo made several telephone calls to his wife. Shortly thereafter, a considerable portion of the stolen jewels was recovered from the trunk of a car in Manhattan. The car belonged to Palermo's wife. Approximately $1,000,000 worth of stolen jewels were missing and have never been returned.

Following the return of some of the jewelry, Palermo's lawyer, Mr. Bobick, received $25,000 from the insurer of the jewels for services rendered in effecting the jewelry return.

On April 16, 1970, Palermo entered a plea of guilty in the third degree in connection with the Provident jewel robbery. Palermo admitted in his plea participating in the jewel robbery. At all other times, however, Palermo has denied that he was involved in the robbery.

Palermo eventually received an unconditional discharge on the charge in Oneida County; the assault charge against Palermo in Queens County was dismissed.

With respect to parole on the twenty-five year Richmond County sentence, Queens District Attorney Thomas Mackell wrote a letter in April, 1970, to the Chairman of the Board of Parole recommending leniency for Palermo and included with the letter an exhibit describing the importance to the community of the jewel recovery. According to the Queens District Attorney, such a letter from him was a rare occasion and constituted a great effort on his part.

According to the Queens District Attorney, inquiries were made concerning a personal appearance before the Board. That office was informed that no personal appearances were permitted.

According to an investigator for the State Parole Board, a representative of the Queens District Attorney's office

told him by telephone in December, 1969, that in his opinion Palermo deserved no leniency. This was followed, however, by the Queens District Attorney's formal recommendation for leniency to the Parole Board in April, 1970.

On June 3, 1970, Palermo and his co-defendant appeared before the New York State Board of Parole for a minimum period of imprisonment hearing in accordance with New York law.* Palermo and his co-defendant were both told that while persons outside the parole board may make recommendations, the Board was not bound by them and made decisions on the merits of each case.

Palermo and Saltzman were given minimum periods of imprisonment of six and five years, respectively.

In August, 1970, Palermo and Saltzman were scheduled to be released on parole according to their version of the "deal." In view of the minimum periods of imprisonment established by the Parole Board, however, they remained incarcerated. Saltzman was eventually released on parole in 1974. Palermo was never found suitable for parole.

It is undisputed that the consent of the Richmond County Supreme Court or the Richmond County District Attorney was never obtained concerning the proposed parole after one year on Palermo's judgment of conviction and sentence of twenty-five years imposed in Richmond County. Indeed, it is apparent that no official in Richmond County was ever consulted. Under New York law, the Queens County District Attorney operates within specified geographic boundaries and has no authority to proscribe the authority, obligations, or prerogatives of the Richmond County District Attorney or Richmond County Supreme Court.*

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* Correction Law § 212. The Parole Board is empowered tto establish a minimum period of imprisonment when this has not been done by the sentencing court.

* New York County Law § 700(1) (McKinney's, 1972); New York Criminal Procedure Law 20.40 (McKinney's, 1971); *People* v. *Dorsey*, 176 Misc. 2d 932, 29 N.Y.S. 2d 637 (Queens Co. Ct., 1941).

It is also undisputed that the advance consent of the State Board of Parole was never obtained concerning the proposed parole after one year on Palermo's twenty-five year Richmond County sentence. Under New York law, the State Board of Parole is the sole body charged with determining who among inmates shall be released on parole and under what conditions.**

B. State Court Proceedings

Palermo moved in Queens County Supreme Court to withdraw his guilty plea to the Queens robbery. In his moving papers, Palermo alleged that his lawyer Edward Bobick may have lied to him and inadequately represented him concerning the negotiations with the Queens District Attorney's office. In one of his moving papers, Palermo described the commitment by the Queens District Attorney on the parole question as a commitment "to strongly endeavor to obtain a mitigation of the time which your deponent (Palermo) would have to serve to satisfy the parole commission".

Following a hearing, the motion to withdraw the plea was denied and both Palermo and Saltzman received sentences of an unconditional discharge on robbery convictions involving the theft of $4,000,000 in jewels. The state court found that representations had been made by the District Attorney to Palermo that he would receive an unconditional discharge.

C. Federal Court Proceedings

Plaintiff Thomas Palermo filed an action in federal court in 1970 against numerous defendants, including various members of the Queens District Attorney's office and the Parole Board. The complaint was dismissed as against all save three named defendants in 1971 (MANSFIELD, J.) in an opinion reported at 323 F. Supp. 478 (S.D.N.Y. 1971).

** New York Correction Law §§ 210, 213, 214 (McKinney's Supp. 1975-1976).

The three individuals who remained in the action as defendants were Russell Oswald, Chairman of the Board of Parole at the time; Howard Jones, a parole commissioner at the time; and Captain O'Conner, a police officer at the time.

Palermo amended his complaint but the District Court (MANSFIELD, J.) adhered to its decision on July 26, 1971.

Palermo made some attempt at an appeal *pro se,* but the proceeding was ultimately dismissed. Counsel was obtained for Palermo several years ago.

The case came to trial and hearing in April, 1976. The District Court conducted a combined habeas corpus evidentiary hearing and jury trial on the liability and damages issue as to the three remaining § 1983 defendants.* The material evidence adduced was essentially that recited in the statement of "Facts", Part A, *supra,* p. 2.

1. *Decision of the District Court*

At the close of the hearing on April 22, 1976, without benefits of briefs or argument and clearly in excess of its habeas jurisdiction, the District Court ordered Palermo's immediate release from all custody on both the Richmond County and Queens County convictions and sentence. In its subsequent opinion at 412 F. Supp. 935, the District Court rested its decision on *Santobello* v. *New York,* 404 U.S. 271. The District Court found, *inter alia,* that Palermo and Saltzman had been promised parole after one year in prison on the twenty-five year sentence in Richmond County. The promise came from the Queens District Attorney.** The District Court further found that, although

* The complaint was dismissed as against these individuals at the close of Palermo's case for failure to put forth a prima facie case.

** It should be noted that Edward Bobick, the lawyer who negotiated the final "deal", was never called to testify by Palermo.

(footnote continued on following page)

Queens District Attorney Meckell had written a letter to the Parole Board asking that leniency be shown Palermo, such letter was ambiguous and insufficient. The District Court failed to discuss in its decision the effect of either the *ultra vires* nature of the District Attorney's alleged promise of parole or the legality of Palermo's consideration of the return of stolen jewels.

2. *Decision of the Court of Appeals*

The United States Court of Appeals, in a two to one decision, affirmed the decision of the District Court. The Court of Appeals found that the District Court's findings of fact were not clearly erroneous. The Court also concluded that *Santobello* required specific performance of the prosecutor's *ultra vires* promise of parole. In addition, the Court concluded that stolen jewelry was not an unlawful consideration primarily because Palermo claimed he was innocent of the jewel robbery and the Queens District Attorney's office had initiated the negotiations.

Judge Bartels dissented, pointing out that (1) the the prosecutor's *ultra vires* promise of parole usurped the prerogatives of an independent government agency, the New York Board of Parole and emasculated a judgment of conviction imposed in another county and independent jurisdiction without the consent of any official in that jurisdiction, and (2) the withholding of the jewels which Palermo had no right to withhold* subjected the Queens

(footnote continued from preceding page)

No attempt to find him was made until four days before trial. To the extent the District Court's findings turned on the versions of the deal given by Bobick as recounted by Palermo, those findings are indefensibly based on hearsay. Mr. Bobick received $25,000 for his services from the insurer victim, although Bobick's client was supposedly the accused and convicted perpetrator.

* New York Personal Property Law, § 252 (McKinney's 1976); New York Penal Law, §§ 195.05, 155.00, 155.05, 155.35, 205.50(1), (4), (5), 205.55 and 205.60 (McKinney's 1975).

County District Attorney to duress. Under these circumstances, the dissent considered the specific enforcement of the bargain to be inappropriate.

Reasons Why Certiorari Should Be Granted

This Court should determine whether a plea bargain is valid and specifically enforceable within the meaning of *Santobello* v. *New York,* 404 U.S. 257 (1971), where the primary considerations in the plea bargain are the return of stolen property by the defendant and an *ultra vires* promise by a prosecutor which usurps the prerogatives and powers of independent governmental jurisdictions and agencies. These questions raise important issues of public policy. The decisions of the courts below violate the letter and spirit of this Court's decision in *Santobello* and conflict with the decisions of other Circuit Courts of Appeal in similar circumstances. The rationale below can be read as an invitation to every criminal who steals property to require specific performance.

A. A "plea bargain" in which stolen property is a primary consideration is not a valid enforceable plea bargain within the meaning of *Santobello* v. *New York,* 404 U.S. 257 (1971).

In ruling that the withholding and concealment of stolen property was a lawful consideration in a plea bargain, the courts below reached a result completely contrary to the letter and spirit of this Court's decision in *Santobello* v. *New York,* 404 U.S. 257 (1971), wholly contrary to the result of at least one other Circuit Court of Appeal, and completely contrary to the basic purpose of law.

Santobello involved a simple and standard plea bargain in which each side relinquished to the other side rights which it was entitled to possess and was not otherwise obliged to surrender. No such plea bargain existed in this case. Since Palermo obviously had no right to conceal the whereabouts of stolen property, he could not use his control or knowledge of such stolen property as a lawful consideration in any purported plea bargain. Clearly, this "plea bargain" was not a true plea bargain within the meaning of *Santobello.*

At least one other Circuit Court of Appeals has reached a different result in a "plea bargain" involving an unlawful consideration. In *United States* v. *Gorham,* 523 F. 2d 1088 (D.C. Cir. 1975), the Court found that a promise of immunity from a federal judge and a Corrections Commissioner made to inmates who were holding the Commissioner hostage was not binding on the United States Attorney. Part of the holding was grounded on the theory that the case was not a *Santobello* situation because there was no lawful consideration and because the bargain involved the performance of a pre-existing duty. Although this case does not involve hostages, clearly the same principles are applicable. Stolen jewelry was not a valid consideration with which Palermo could bargain and he was under a clear pre-existing duty not to conceal or retain stolen goods. See also *United States* v. *Bridgeman,* 523 F. 2d 1099 (D.C. Cir. 1975).

In addition to departing from fundamental principles of plea bargaining, the decisions of the courts below defied the basic purpose of law by sanctifying the return of stolen loot and by giving legal sanction to what was in effect ransom and extortion. "Plea bargaining" was never meant to work such a result.

B. A plea bargain in which a prosecutor's *ultra vires* promise is a primary consideration and which usurps the prerogatives and powers of independent governmental agencies and jurisdictions is not a valid enforceable plea bargin within the meaning of *Santobello* v. *New York,* 404 U.S. 257 (1971).

In awarding specific performance to the Queens County prosecutor's *ultra vires* plea bargain promise, a promise

which usurped the powers and prerogatives of the independent New York Board of Parole and which invaded the jurisdiction of the courts and prosecutor of another county, the decisions of the courts below reached a result which is completely contrary to results reached by other Courts of Appeal in similar circumstances, completely inconsistent with this Court's decision in *Santobello,* and wholly inconsistent with basic principles of public policy.

A plea bargain in which one of the considerations is an *ultra vires* promise is not a valid plea bargain at all within the meaning of *Santobello.* As noted above, *Santobello* involved a simple and standard plea bargain in which each side relinquished to the other side rights which it was legally entitled to possess and was not otherwise obliged to surrender. No such plea bargain exists in this case. The *ulra vires* nature of the promise in this case fully distinguishes the instant case from *Santobello.* The promise in *Gorham, supra,* in addition to involving no true consideration, was also *ultra vires* and for that reason unenforceable. *Gorham, supra* at 1096-1098. Similarly, in *United States* v. *Long,* 511 F. 2d 878 (7th Cir.), cert. den. 423 U.S. 895 (1975), a state agent's *ultra vires* promise of immunity from federal prosecution was held non-binding on the United States. Although the decision in *Long* turned on the fact that no agency existed between the state and federal government, the promise was nonetheless for that very reason *ultra vires* and the court specifically found *Santobello* to be inapplicable. See also *People* v. *Campbell,* 35 N Y 2d 227, 241, 360 N.Y.S. 2d 623, 636 (1974).

In holding that the instant non-fulfillable plea bargain promise by prosecutors must be specifically enforced, the Second Circuit Court of Appeals relied on cases such as *United States* v. *Carter,* 454 F. 2d 426 (4th Cir. 1972) (en banc), *cert. den.* 417 U.S. 933, and *Geisser* v. *United States,* 513 F. 2d 862 (5th Cir. 1975).

The Circuit Court in *Carter* held that a federal prosecutor's promise of immunity from federal prosecution outside his jurisdiction must be upheld. In *Geisser,* the Justice Department breached a plea bargain in which the Department had promised the defendant parole after three years imprisonment, a promise which the Department had no power or authority to make. The Court of Appeals was reluctant to interfere with integrity of the parole process and declined to put its stamp of approval on the District Court's order of specific performance. Instead, the Court remanded to the governmental units involved for further consideration.

To the extent that *Carter* or *Geisser* support the decision of the Second Circuit Court of Appeals, in this case,* those cases are incorrectly decided and conflict with the nil effect given to *ultra vires* promises by the District of Columbia Circuit and Seventh Circuit in *Gorham* and *Long,* respectively.

Specific performance of this *ultra vires* promise grossly interfered with the lawful administration of justice in New York State. As Judge Bartels noted in his dissent, the *ultra vires* promise in this case was significant in that it usurped the prerogatives and powers of (a) the New York State Board of Parole, an agency completely independent under New York law, and (b) the Richmond County prosecutor and Richmond County Court, neither of whom were ever consulted in the plea bargain which was to so dras-

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* *Carter* is inapposite to this case since it does not involve the usurpation of jurisdiction and prerogatives of one independent unit by another. The Court in *Carter* viewed the problem there as one of poor internal management within the Department of Justice rather than *ultra vires* promise. The Court in *Geisser* did not conclude that it could or would specifically enforce the promise. See also *Correale* v. *United States,* 479 F. 2d 944 (1st Cir. 1973) (remedy for prosecutor's recommendation of illegal sentence was resentencing to specific term).

tically affect the judgment imposed in their jurisdiction. The specific enforcement of such a promise obviously raises grave questions of public policy, questions which received no attention from either the majority in the Court of Appeals or the District Court. The sovereign and its people have an absolute right to have the administration of justice conducted strictly in accordance with the law. The specific enforcement of this purported promise destroys this right, and, as the dissent notes, disrupts the state administration of justice.*

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* Clearly, if any relief was warranted at all in this case, the only correct course in the circumstances was to remand the case to the state courts to determine the appropriate relief or attempt an equitable solution. Indeed, such a remand is required by this Court's decision in *Santobello*, and the failure of the courts below to remand to the state courts was clear error. The error was especially egregious in the circumstances of this case, since in ordering specific performance the courts below imposed an illegal act on the state. If this were necessary to achieve justice, it should have been left to the state courts to impose any illegal act on the State. The state courts should be permitted to devise a solution consistent with both ends of justice and the integrity of state law. In the alternative, the courts below should have vacated the Queens County guilty plea, as has been done in other cases involving *ultra vires* plea bargain cases, e.g. *United States* v. *I.H. Hammerman II*, 528 F. 2d 326 (4th Cir. 1975); *Harris* v. *Superintendent, Va. State Penitentiary*, 518 F. 2d 1173 (4th Cir. 1975); and has been suggested as the proper solution by this Court in *Brady* v. *United States*, 397 U.S. 742, 755 (1970).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
January 13, 1977

Respectfully submitted,

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Appendix "A".

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1341, 1342, 1343—September Term, 1975.

(Argued July 22, 1976 Decided November 1, 1976.)

Docket Nos. 76-2055, 76-2060, 76-2063

THOMAS PALERMO and SHELDON SALTZMAN,

Petitioners-Appellees,

v.

WARDEN, GREEN HAVEN STATE PRISON,

Respondent-Appellant,

and

RUSSELL OSWALD, E. K. JONES, JOHN DOE,
RICHARD ROE, JOHN O'CONNOR,

Defendants-Appellants.

Before:

WATERMAN and MESKILL, *Circuit Judges,* and
BARTELS, *District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York, Griesa, *J.*, granting a writ of habeas corpus because of prosecutorial nonfulfillment of a plea bargain and cross-appeal from the earlier dismissal of a complaint against two other defend-

* Of the Eastern District of New York, sitting by designation.

ants by the United States District Court for the Southern District of New York, Mansfield, *J.*

Affirmed.

NANCY ROSNER, New York, New York, *for Appellee Palermo.*

HARRY L. SIMMONS, New York, New York, *for Appellee Saltzman.*

RALPH MCMURRY, Assistant Attorney General, State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, of counsel), *for State Appellants.*

MESKILL, *Circuit Judge:*

In 1970, Thomas Palermo and Sheldon Saltzman, both New York State prisoners, brought suit against a multitude of officials seeking, *inter alia,* damages for alleged nonfulfillment of a negotiated plea agreement and immediate release from prison under 42 U.S.C. §§ 1983, 1985. Judge Mansfield, then a district judge, held that the complaint stated a valid claim against Parole Commissioners Russell Oswald and Howard Jones and other parole commissioners named as John Doe defendants, and against New York City Police Detective John O'Connor. The district court dismissed the complaint as to Queens District Attorney Thomas Mackell and Chief Assistant District Attorney Frederick Ludwig for failure to allege sufficiently justifications to abrogate prosecutorial immunity. *Palermo* v. *Rockefeller,* 323 F.Supp. 478 (S.D.N.Y. 1971).[1] No final judgment was entered as to the dismissed defendants. Five

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[1] Plaintiffs then filed an amended complaint against these defendants, which Judge Mansfield dismissed on July 26, 1971. The case thus was left in the same posture as after the first decision.

years later, on April 19, 1976,[2] trial commenced on Palermo's habeas claim before Judge Griesa and on the damage claim by both plaintiffs against the parole commissioners and Detective O'Connor before a jury. Upon the trial's conclusion on August 22, 1976, Judge Griesa held that there was insufficient evidence to submit any of the damage claims to the jury and dismissed the case against Oswald, Jones and O'Connor.[3] Granting Palermo's application for a writ of habeas corpus, the district court concluded that the prosecuting authorities negotiated a plea bargain in bad faith and failed to fulfill the promises made. The court ordered Palermo's unconditional release without parole as the only meaningful form of relief.

On appeal, the State raises seven claims of error: (1) that the findings of the district court that Palermo was induced to plead guilty by representations not carried out were clearly erroneous; (2) that the return of stolen property was unlawful consideration which could not support a plea bargain; (3) that Palermo materially

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[2] In the interim, pursuant to the Supreme Court's decision in *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), plaintiffs' § 1983 claim for injunctive relief in the form of release from prison was treated as a habeas corpus petition. The Attorney General of the State of New York then moved for dismissal of that aspect of the case, alleging nonexhaustion of state remedies. Since Saltzman did not exhaust state remedies and, by July, 1974, had been released on parole and had made no claim relating to his parole status, he was not a party in the habeas action. The State ultimately withdrew its nonexhaustion defense as to Palermo and consented to the addition, as a party defendant, of the Warden of Green Haven State Prison, where Palermo was incarcerated when the trial began.

[3] Plaintiffs consented to the dismissal against Oswald and Jones. The district court also dismissed the action against all the John Doe and Richard Roe defendants, the anonymous parole commissioners. Since no final order had been entered in 1971, when the action against Mackell and Ludwig was dismissed, the court noted that any right of appeal would accrue when final judgment was entered after the 1976 proceeding.

breached his obligations by failing to return all of the stolen property; (4) that any parole promises made were *ultra vires* and not binding on the State; (5) that the relief afforded was unlawful and inappropriate; (6) that the dismissal in favor of Mackell, Ludwig and others should have been entered *nunc pro tunc;* and (7) that the district court abused its discretion in denying defendants Jones and Oswald costs and attorney's fees. In addition, Palermo and Saltzman appeal from the 1971 dismissal of the damage claim against Mackell and Ludwig. For the reasons stated below, we affirm.

I. *The District Court's Findings.*

The State contends that the findings of the district court are clearly erroneous because it failed to consider critical facts, primarily the extraordinary role played by Palermo's attorneys, and because it "chose to believe all plaintiffs' witnesses and none of respondent's witnesses." The basic chronology of events is not in dispute. On the morning of February 17, 1969, several men robbed the Provident Loan Society ("Provident") in Queens County of several millions of dollars worth of jewelry which had been pledged by more than 2,000 Queens residents to the Provident as collateral for loans. That same morning, Palermo and Saltzman were scheduled for trial for an armed robbery which previously had occurred in Richmond County. The two men did not appear for trial until mid-day. In late February, 1969, both men were found guilty of the Richmond robbery, after a jury trial, and remanded to custody pending sentencing in that case. After several adjournments, they still awaited sentence in May, 1969, by which time they also had been arrested for the Provident robbery. Saltzman admitted his role in the Provident robbery while Palermo maintained he did not participate in that robbery. Evidently, although there were various negotiations be-

tween the Queens prosecutors and Palermo and Saltzman,[4] no agreement was reached before the Richmond County sentence was imposed on June 27, 1969, at which time Palermo received an indeterminate sentence with a maximum of twenty-five years and Saltzman received an indeterminate term with a fifteen year maximum. On July 6, 1969 Palermo and Saltzman began their term of incarceration in Sing Sing State Prison. On July 17, 1969, the two inmates were brought from Sing Sing to the Queens House of Detention for discussions about the Provident robbery and the related charges against them pending in Queens County.

At this point, to better assess the district court's findings, we turn to the testimonial evidence adduced at trial. Palermo testified shortly after his return from Sing Sing,

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[4] Palermo testified that there were three "deals" offered before sentence was imposed in the Richmond County robbery. The first offer, made at a meeting attended by O'Connor, Queens Assistant District Attorney Demakos, Jacob Evseroff (Palermo's attorney at that time), William Smith (Saltzman's attorney) and Palermo and Saltzman, was for a ten year sentence in exchange for return of the Queens County jewelry. Palermo's reply was that he knew nothing about that crime. Evseroff confirmed that such a meeting was held. The Richmond Assistant District Attorney then obtained an adjournment of the sentencing scheduled for that day. On the next date set for sentencing, Evseroff communicated a second offer of a seven year sentence for Palermo and five years for Saltzman in exchange for the jewelry. Again Palermo expressed his lack of knowledge and again sentencing was adjourned. By the time of the third offer, Palermo had been arrested for the Provident robbery and had learned that Saltzman was a participant. Evseroff was no longer his attorney, having been replaced by Edward Bobick. Palermo accepted a deal which would entail a five year sentence for him, three years for Saltzman, a $100,000 reward from the Provident's insurers and no prosecution for the Provident robbery. This deal was not consummated when Queens Assistant District Attorney Gaudelli, who had replaced Demakos at the sentencing, refused to consent to less than a seven year term for Palermo, which Palermo would not accept.

attorney Bobick[5] conveyed an offer, allegedly from Mackell's office, for reducing the Richmond robbery sentence to seven years for Palermo and five years for Saltzman, with parole after one year from the time they arrived in Sing Sing, and a $100,000 reward from the Provident's insurers for return of the jewels. In addition, Palermo and Saltzman were to plead guilty to the Provident robbery and receive suspended sentences or unconditional discharges. Palermo indicated that this arrangement was acceptable to him.

A few days later, Palermo received a visit from Detective O'Connor, acting as liaison between Mackell's office and the inmates, and attorney Evseroff.[6] Evseroff stated that Bobick had misrepresented the situation, since there could be no resentencing in the Richmond case. Also claiming to be the bearer of a deal from the prosecutor's office, Evseroff offered the following terms: no reduction of the Richmond robbery sentence but parole in 18 months (from the time of the original incarceration in February, 1969) due to prosecutorial intercession with the Parole Board; a suspended sentence or unconditional discharge on the Provident robbery charge; dismissal or unconditonal discharge after a plea of guilty to a lesser offense for a pending charge in Oneida County (the "Utica offense") and dismissal of the Utica charge against two co-defendants; and dismissal of an assault charge pending in Queens. Palermo testified that he specifically asked O'Connor to determine how the district attorney's office planned to handle inter-

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[5] Bobick represented both Palermo and Saltzman in the Provident robbery case. The law firm representing the Provident and its insurer had promised Bobick a $25,000 fee if his aid resulted in return of the jewelry.

[6] Evseroff had represented Palermo in the Richmond robbery case. Evseroff endeavored to effect a return of the jewelry because of a $50,000 fee from the Provident's insurer if the jewels were returned.

action with the Parole Board and the Oneida County authorities. He received assurances from O'Connor that Ludwig had made the proper contacts. Evseroff confirmed in his testimony that Ludwig told him that the Parole Board would arrange an early parole for Palermo if Ludwig so recommended; according to Evseroff, "early parole" meant parole after one year in Sing Sing. Palermo conferred again with Bobick, who reaffirmed his bargain and told Palermo to check it out with Norman Rein, an attorney with the law firm of Rein, Mound & Cotton, which firm had been retained by the Provident and its insurer. On October 10, 1969, two members of the Rein firm, Arthur Brook and Eugene Leiman, and Detective Caparell, representing the Queens District Attorney's Office, met with Parole Commissioner Jones. While the specifics of that conversation are unclear, it appears that, at the least, Commissioner Jones indicated that the Parole Board would consider the request for early parole, although no commitment could be made. On October 24, 1969, at a meeting attended by O'Connor, Rein, and Bobick, Palermo testified that he accepted a deal with the following terms: parole on the Richmond sentence after one year, a $100,000 reward from the insurers; a suspended sentence or unconditional discharge after a plea of guilty to the Provident robbery; dismissal of the assault charge in Queens; disposition of the Utica charge by Palermo's plea of guilty to a misdemeanor, and dismissal as to two co-defendants. Later that afternoon, Bobick, Rein and O'Connor returned to tell Palermo that Mackell would not consent to the $100,000 payoff by the insurer. Palermo said that he then accepted the deal without the reward.

Once released, Palermo was taken to Ludwig's office; he testified that the Chief Assistant then personally confirmed the above described terms. Palermo made several phone calls and took detectives to a parked car where $4,000,000

worth of jewelry was found. After the recovery of the jewelry, Mackell issued a press release describing the "largest recovery of stolen property in the history of law enforcement" as a result of "painstaking negotiations by his office." On April 16, 1970, Palermo entered a guilty plea to the Provident robbery. He also pleaded guilty to a misdemeanor in the Utica case, receiving an unconditional discharge. The Queens assault charge ultimately was dismissed. After one postponement, on June 3, 1970, Palermo appeared before the Parole Board for his minimum period of imprisonment hearing. Mackell had written a letter to Russell Oswald, Chairman of the Parole Board, the pertinent part of which stated:

> Solely because of the cooperation of [Palermo], practically all of the property taken in that robbery was recovered. In negotiating the return of this property, my office firmly committed itself to use all means lawfully possible to assure lenient treatment to the offender.

Norman Rein also wrote a letter to the Parole Board which stated in pertinent part:

> Without the active assistance of Thomas Palermo, the recovery of this enormous amount of property . . . could not have been effected. On the day of the recovery, Mr. Mackell asserted that he would do everything within his power to bring to the attention of the Board of Parole the help that Palermo had given in effecting this recovery and, since that time, Mr. Mackell has repeated that promise.
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> • • •
>
> For Palermo's efforts . . . I most earnestly and respectfully urge that the Board grant Palermo the utmost consideration and leniency when he appears before it. I would call to your attention the fact that

> Palermo has received no money or reward of any kind for his part in the recovery. He has received, however, the promise of Mr. Mackell and myself that we would urge your Board to fix the minimum possible time that Palermo will have to serve in jail.

Prior to this apparent support from Mackell, however, on December 15, 1969, John J. McCarthy of the Bureau of Special Services, whose duties included investigations of serious offenders under the aegis of the division of parole, testified that he received a telephone call from Ludwig about the Palermo case. McCarthy stated that he expressed his opinion to Ludwig that Palermo did not merit consideration of any type by any agency because of his serious criminal record. According to McCarthy, Ludwig expressed agreement with this viewpoint and analogized Palermo to Murf the Surf, a recipient of lenient treatment after the return of stolen property, who then committed a violent crime. McCarthy's memorandum summarizing this conversation was placed in several institutional files and circulated to various Parole Board members. After the hearing, the Parole Board set a six year minimum term of incarceration before Palermo's case again would receive parole consideration.[7]

Chief Assistant District Attorney Ludwig testified that there was an agreement reached about the Provident robbery case, the terms of which were entrance of a plea to a lesser charge and a recommendation of lenient treatment to be made in open court. Although Ludwig stated that he indicated that in all probability this recommendation

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[7] Similarly Saltzman's minimum term was set at five years. On September 30, 1970, still before imposition of sentence in the Provident case, Palermo moved to withdraw his guilty plea in state court. This motion was denied but the Queens County sentencing judge unconditionally discharged both Palermo and Saltzman at the time of sentence, January 11, 1971.

would be followed, he did not guarantee the outcome. Insofar as parole was concerned, Ludwig testified that his office promised to use its best efforts to obtain maximum leniency from the Parole Board. District Attorney Mackell stated that no one from his staff was authorized to communicate an affirmative commitment from Justice Farrell to impose a suspended sentence in the Provident case. He acknowledeged that he had promised to make a great effort and "career" of getting Palermo utmost lenience from the Parole Board. He noted that the letter he wrote on behalf of Palermo constituted extraordinary intercession on his part, since he took such action only twice a year at most.

Eugene A. Leiman, an attorney with the Rein firm, also actively participated in the plea negotiations. Regarding the negotiations about the Utica charge, Leiman testified that he became increasingly distressed because he kept getting different versions of the same conversations from negotiators from the prosecutor's office. He expressed a similar reaction to discussions about the Provident robbery charge. Finally, he spoke to Ludwig privately about whether there was any commitment for a suspended sentence in the Provident case from Justice Farrell. Ludwig replied that he had spoken to the judge privately and was "dead sure." Leiman then spoke to Assistant District Attorney Demakos who said that, as far as he knew, there was no commitment in hand. Leiman attempted to clarify the situation by drafting a letter to go directly to Mackell.[8]

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[8] This letter, signed by Norman Rein and sent to Mackell on April 3, 1970, reads as follows in pertinent part:

Dear Mr. District Attorney:

Because of the sensitive nature of the contents of this letter, I am—perhaps out of excessive caution—having it delivered "for your eyes only."

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(footnote continued on following page)

In a memorandum dated March 30, 1970, Leiman summarized his negotiating relationship with the prosecutors about the Provident plea and sentence as follows:

(footnote continued from preceding page)

You will also remember that, in return, Palermo was assured of and promised certain specific assistance and consideration in connection with particular criminal charges.

The first of these concerns Palermo's conviction and sentence for robbery in Richmond County, as a result of which he was sentenced to an indeterminate term in State Prison not to exceed 25 years. With respect to this, you forthrightly stated several times, to me, to my partner, Arthur N. Brook, and to Palermo's attorney, Edward Bobick, that you would "make it a career" to see that Palermo would serve the minimum possible sentence and that, to that end, you would appear before the State Parole Board when Palermo first "met" the Board, and make a strong recommendation to that effect in his favor. I restated this to Palermo, the last time on the very day when the recovery was effected. We understand that Palermo is scheduled to appear before the Parole Board when it meets in Sing Sing Prison on April 28-30, 1970, and I therefore assume I can rest easy that this commitment will be fulfilled to the letter.

The second area of concern is the disposition of the still open indictment pending in Queens County against Palermo as a result of the Provident Loan Jamaica Branch robbery. As you know, Palermo was given assurance by your good office that his charge would be "taken care of" if the property in question were returned. Just how this indictment would be "taken care of" was the subject of many conversations between your Chief Assistant, Mr. Frederick J. Ludwig, and my partner, Eugene A. Leiman, an old colleague of Mr. Ludwig in District Attorney Frank Hogan's office. It was our understanding that Palermo's case was before Judge Farrell, that Judge Farrell had advised Mr. Ludwig that, if the District Attorney would so recommend, he would impose a sentence, upon Palermo's plea of guilty, that was either suspended or would be "time served" so that, in no event would Palermo have to serve any more time than that fixed by the Parole Board. Mr. Ludwig advised Mr. Leiman that he had made such a recommendation to Judge Farrell, in an informal "off the record" discussion of the matter with the Judge and that,

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> The difficult [sic] is that even if I get a commitment by telephone on one day, everybody in the Queens D.A.'s office conveniently forgets it the next. I have gotten to the point where I simply do not believe any oral statements emanating from that office.

After hearing the evidence, the district court concluded that Palermo and Saltzman were induced to plead guilty to the Provident robbery charge by representations made to them by Ludwig and O'Connor that they would receive parole after one year in prison; that Mackell knew of the

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> therefore, were Palermo to plead guilty, he would have "nothing to worry about".
>
> Recently, however, your Mr. Thomas Demakos who, strictly speaking, has jurisdiction over Palermo's case, has advised us that, so far as he knows, Judge Farrell has indicated no more than that any sentence he may impose on Palermo would run "concurrent" with the Richmond County sentence—which is, of course, a far cry from what we were led to believe would actually happen.
>
> Without being in the slightest sense critical of either Mr. Ludwig or Mr. Demakos—both of whom we hold in the highest esteem—it would seem that there is somewhat of a dichotomy in the matter between them.
>
> You alone can resolve that apparent conflict in your staff and, in line with your previously expressed attitude, can resolve it in favor of urging extreme consideration for Palermo. Palermo's case in your County has been adjourned to April 8, when he will again appear before Judge Farrell. We understand that if the type of sentence that Mr. Ludwig previously recommended is then available, Palermo will make a disposition of his indictment.
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> I realize that you have many perhaps more important matters that make current demands on your time and attention. Yet, in the circumstances, I sincerely believe that this matter, which involves no more than honoring a commitment to a convicted robber for helping your office recover stolen property belonging to over 2,000 residents of your County is, consonant with the way you have enhanced the dignity and prestige of your office, still worthy of your personal attention and consideration.

specific commitments made about parole; that Ludwig and Mackell knew they had no such assurances from the Parole Board; and that Mackell clearly violated his agreement to take all possible steps to achieve an early parole for Palermo and Saltzman. In short, the district court concluded that the plea bargain was negotiated in bad faith by the prosecutors and that it was not carried out.

Appellate review of findings of fact is limited to a determination of whether those findings are "clearly erroneous," giving "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Where findings relate to the design, motive and intent behind human actions, they especially depend upon the credibility assessment of witnesses by those who see and hear them. *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949); *Caputo* v. *Henderson*, slip op. 5357, 5367 (2d Cir. September 3, 1976); *United States ex rel. Wissenfeld* v. *Wilkins*, 281 F.2d 707, 713 (2d Cir. 1960). Thus, an appellate court, equipped only with a "cold" record, is appropriately reluctant to reject the credibility evaluations of the district court.

The State challenges the district court's findings on the ground that it failed to consider critical facts, primarily the extraordinary role played by Palermo's attorneys Evseroff and Bobick. The State essentially contends that because both men would receive a fee from the Provident's insurer if the jewels were returned, they had a clear motive to make whatever representations would inspire Palermo to return the jewels. In addition, the State argues that the attorneys had a duty independently to verify the parole

promise with the Parole Board itself. Finally, the State asserts that "it is clear Palermo was hardly the most credible witness" worthy of total belief by the district court.

We conclude that there was substantial evidence to support the district court's finding of prosecutorial bad faith in negotiations and nonfulfillment of the plea bargain. Whether or not there was a specific guarantee of parole after one year, negotiations for the return of the jewels certainly included achieving minimum incarceration for the Richmond robbery through the intercession of the district attorney's office in parole proceedings; minimum incarceration in this case would have constituted a one year term. The evidence also showed that the prosecutor's office did not use even its best efforts to achieve utmost lenience from the Parole Board for Palermo and Saltzman. John McCarthy's testimony about his conversation with Ludwig, memorialized in a memorandum circulated to several Parole Board members, certainly brings into question the diligence with which the prosecutors intended to fulfill their part of the bargain. Although Mackell did write a letter to the Parole Board, the recommendation of "lenient treatment" in that letter represented only a feeble effort to fulfill Mackell's commitment to make a "career" of achieving utmost lenience, especially when compared to Rein's letter written for the same purpose. Notably, Rein also offered to appear personally before the Board. While the Board does not permit third parties to appear at the hearing itself, special meetings can be scheduled upon request. Commissioner Oswald testified that the District Attorney's office had never requested such a meeting. There is also the testimony of Eugene Leiman, who participated in the negotiation phase, which reflected his frustration about the firmness of any oral commitment from the district attorney's office. Finally, there are the contradictions, too numerous to mention, between testimony from the prosecutors and related staff and from other witnesses.[9] After consideration of the entire record, we simply cannot fault the credibility assessments made by the district court or conclude that its findings were erroneous, much less clearly erroneous.[10]

II. *Enforcement of the Plea Bargain.*

The State raises three arguments grounded in contract law which dispute the validity of the negotiated agreement. First, the State contends that stolen property cannot serve as consideration for a bargain. The State also asserts that Palermo materially breached the bargain by failing to return all of the jewelry. Finally, the State claims that any parole promise was outside the scope of prosecutorial authority and not binding on the State.

Although we noted last term that principles of contract, evolving as they do from the commercial world, are "inapposite to the ends of criminal justice," *United States ex rel. Selikoff* v. *Com. of Corr.*, 524 F.2d 650, 654 (2d Cir. 1975), this Court has not previously examined the extent to which the contractual defenses would be applied to plea bargaining in the criminal justice system.[11] Guiding our

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[9] For example, Ludwig testified that he had not communicated any commitment from Justice Farrell as to sentence in the Provident case. Leiman testified that Ludwig privately had assured him of such a commitment.

[10] We fail to see how the conduct of attorneys Evseroff and Bobick helps the State's argument, since it might only raise a further claim of ineffective assistance of counsel. We cannot condone the questionable practice of negotiating plea bargains, thereby advising clients to plead guilty, while at the same time collecting rewards from insurers.

[11] In *United States* v. *Boulier*, 359 F.Supp. 165 (E.D.N.Y. 1972), *aff'd. sub nom. United States* v. *Nathan*, 476 F.2d 456 (2d Cir.),

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analysis is the Supreme Court's recognition of plea bargaining as "an essential component of the administration of justice. Properly administered, it is to be encouraged." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971). The Court further stated, however, that the plea bargaining process must be "attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* at 262.

The first contractual defense raised is that the return of the jewels is unlawful consideration because Palermo had no legal right to conceal or withhold stolen property. The State analogizes the instant agreement to one made with kidnappers who hold hostages at the time the ransom is negotiated. We believe the facts of this case render the analogy inappropriate and that the State should be estopped from raising this defense at such a late date.

The State claims that the district court's decision sanctifies the return of some of the stolen loot and defies the basic purpose of law. We do not agree. It must be remembered that Palermo claimed that he was innocent of the Provident robbery throughout the bargaining. That bargaining was

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cert. denied, 414 U.S. 823 (1973), the district court denied the defendant's motion to dismiss an indictment for two reasons: the defendant had failed to fulfill his part of a plea bargain and the Assistant United States Attorney possessed the authority to bind only his own district in plea agreements. On appeal, this Court affirmed on the first ground and explicitly did not rule on the authority of one United States Attorney to bind another or on the proper remedy for a defendant who has been deceived. 476 F.2d at 459. In *United States ex rel. Selikoff* v. *Com. of Corr., supra*, we found that no unconditional sentencing promises had been made by the trial judge and that any due process deprivations had been remedied by repleading. Finally, in *United States* v. *Papa*, slip op. 2977, 2993 (2d Cir. April 2, 1976) and *United States* v. *Alessi*, slip op. 4781, 4810 (2d Cir. July 7, 1976), our decisions rested upon the terms of the plea bargain involved, which we found did not bar the contested prosecution.

initiated by the Queens prosecutors when Palermo and Saltzman were in jail for an unrelated crime. Although the parties extensively negotiated what benefits would accrue to Palermo and Saltzman, the prosecutors' objective at all times was effecting the return of the jewels. In addition, it must be remembered that, as part of the bargain, Palermo pleaded guilty to the Provident robbery and the Utica charge. Furthermore, at no time during the negotiations or after Palermo had achieved the return of the goods did the prosecutors express any dissatisfaction with the jewelry serving as consideration for the bargain. Indeed that office widely publicized its success in "painstaking[ly] negotiat[ing]" the return of the stolen property.

The cases cited by appellants to support their argument are inapposite, involving bargains negotiated under extreme duress, *United States* v. *Gorham*, 523 F.2d 1088 (D.C. Cir. 1975) (promise of immunity from prosecution given by hostage being mistreated during prison riot), or civil lawsuits for specific performance of a contract solicited by a wrongdoer, *Stamatiou* v. *United States Gypsum Co.*, 400 F.Supp. 431 (N.D. Ill. 1975) civil suit for specific performance by plaintiff who first committed theft under state law and then proposed bargain with owner for return of property). Thus, whether by notions of fundamental fairness or contract principles of estoppel,[12] we must reject the State's belated and rather disingenuous challenge to the consideration used to support the bargain.

The State's assertion that Palermo materially breached the terms of the bargain by not returning all of the stolen jewelry is equally unpersuasive. We first note that evidently the amount and value of the property stolen was

[12] The equity doctrine of estoppel prevents disavowal of a contract after one party in good faith relies to his own detriment on the representations of the other. 1 S. Williston on Contracts, §§ 139-140 (3d Ed. 1975 Supp.).

never precisely determined. Moreover, in both its press release and its letter to the Parole Board, the district attorney's office indicated no dissatisfaction with the extent of the recovery.

The State finally argues that, assuming the Queens District Attorney did promise parole to Palermo on the Richmond County sentence, this promise was *ultra vires* and not binding on the State. Acknowledging the general proposition that prosecutors must keep promises, the State nevertheless contends that it can dissociate itself from a promise if the prosecutor lacked the authority to make the commitment in question. We disagree.

Santobello v. *New York, supra,* 404 U.S. at 262, established that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Resting on principles of fairness in securing such an agreement and the adjudicative element inherent in accepting a plea, *Santobello* focused on an "appropriate recognition of the duties of the prosecutor in relation to promises made" in plea negotiations. *Id.* Neither the inadvertence of the breach nor its possibly harmless effect[13] obviated the need for remand to the state court for appropriate relief.

Clearly, then, *Santobello* requires relief when the prosecutor fails to fulfill promises within his power made in negotiating a plea bargain. *United States* v. *Brown,* 500 F.2d 375 (4th Cir. 1974); *United States* v. *Ewing,* 480 F.2d 1141 (5th Cir. 1973). We believe that the reasoning underlying *Santobello* applies no less when the prosecutor makes unfillable promises in negotiating a plea. Most importantly, the voluntariness of a plea induced by unfulfillable promises is, of course, open to grave doubt. In *Brady* v.

[13] The sentencing judge stated that he had not been influenced by the prosecutor's recommendations.

United States, 397 U.S. 742, 755 (1970), the Supreme Court declared that a guilty plea induced by misrepresentation, including unfulfilled or unfulfillable promises, could not stand. Additionally, fundamental fairness and public confidence in government officials require that prosecutors be held to "meticulous standards of both promise and performance." *Correale* v. *United States,* 479 F.2d 944, 947 (1st Cir. 1973). Thus, the courts have afforded relief where prosecutors have made specific sentencing promises which were unfulfillable, since sentencing lies totally within the court's discretion, *United States* v. *I. H. Hammerman II,* 528 F.2d 326 (4th Cir. 1975); *Harris* v. *Superintendent, Va. State Penitentiary,* 518 F.2d 1173 (4th Cir. 1975); *Correale* v. *United States, supra,* or where one federal prosecutor promised immunity from federal prosecution outside his own jurisdiction, *United States* v. *Carter,* 454 F.2d 426 (4th Cir. 1972) *(en banc), cert. denied,* 417 U.S. 933 (1974).[14] *Geisser* v. *United States,* 513 F.2d 862 (5th Cir. 1975) involved breach of a Department of Justice plea bargain which entailed, in part, a promise of parole after three years imprisonment. On appeal, the Department argued that the district court usurped the exclusive power of the Parole Board by ordering release. The Court of Appeals, although it remanded the case for a determination of what the Parole Board would do when informed of the bargain,[15] concluded that such a bargain "fits well within the realm of enforceable constitutional rights . . . ." 513 F.2d at 869 n.11. We agree and hold that where a defend-

[14] *United States* v. *Long,* 511 F.2d 878 (7th Cir.), *cert. denied,* 423 U.S. 895 (1975), considered a different issue. That case involved promises of immunity from federal prosecution made by a state agent. The issue on appeal was whether an agency relationship existed so that the state agent bound the federal authorities.

[15] In the instant case the Parole Board knew about the plea bargain before determining the minimum period of incarceration.

ant pleads guilty because he reasonably relies on promises by the prosecutors which are in fact unfulfillable, he has a right to have those promises fulfilled.[16]

The district court determined that specific performance of the plea bargain would constitute the only meaningful relief in the context of this case. The court found that if the agreement had been fulfilled, Palermo would have been released from prison in August, 1970, and the five year parole supervision period would have expired in 1975. Since both of these time periods had passed, the court ordered Palermo's unconditional release. The State argues that the proper remedy would have been remand to the state court for vacatur of the Provident robbery plea.

In *Santobello,* the Supreme Court listed the possible remedies as either specific performance of the agreement or vacatur of the plea, the choice to be a discretionary one guided by the circumstances of each case. 404 U.S. at 263. Where appropriate, the courts have not hesitated to mandate specific performance of the agreement. *Correale* v. *United States, supra; Harris* v. *Superintendent, Va. State Penitentiary, supra.* We cannot conclude that the district court erred in determining that specific performance was the proper remedy in this case. Palermo had already been incarcerated for the entire promised prison sentence and parole term. Remand for withdrawal of the guilty plea would indeed have been meaningless, as the court below found.

III. *Other Claims.*

Appellees contest the 1971 dismissal of the damage action against prosecutors Mackell and Ludwig. We find

[16] Appellants cite a multitude of civil contract cases involving an *ultra vires* defense, which cases rest on totally different policy considerations than those which underlie plea bargaining in the criminal justice system.

this case to fall within the purview of the Supreme Court's recent decision in *Imbler* v. *Pachtman,* 424 U.S. 409 (1976) and affirm the dismissal.

Finally, we cannot say that the district court abused its discretion in denying attorney's fees and costs to Jones and Oswald. Fed. R. Civ. P. 54(d).

We affirm the decisions of the district court on both the appeal and cross-appeal.

BARTELS, *District Judge* (dissenting):

As stated by Chief Judge John R. Brown in *Geisser* v. *United States,* 513 F.2d 862, 863 (5th Cir. 1975), "[t]his is an extraordinary case calling for extraordinary action." In this habeas corpus proceeding, originally instituted as a 42 U.S.C. § 1983 action, the majority expands the jurisdiction of a district attorney of one county to (i) bind the Board of Parole of the State of New York (ii) emasculate an indeterminate sentence with a maximum of 25 years previously imposed upon the petitioner, Palermo, by a state court in another county, and (iii) substitute therefor a one year sentence plus a five year period of parole supervision. The predicate for this result is a breach of a promise or commitment made by Queens County district attorney Mackell and his chief assistant Ludwig to carry out that part of a plea bargain promising Palermo early parole on a Richmond County conviction which induced him to plead guilty to a Queens jewelry theft and return $4 million worth of stolen jewelry, over which Palermo obviously had control. It was also provided in the agreement that Palermo would receive a discharge or suspended sentence for the Queens County plea of guilty, a dismissal of an assault charge pending in Queens County, and a disposition of an Oneida County charge which consisted of a plea of guilty by Palermo and a dismissal as against

two codefendants. All parts of the agreement were performed except the parole promised Palermo after one year incarceration under the Richmond County sentence.

The facts are set forth in detail in the majority opinion, which in turn is based upon the findings of the district court. From these facts the precise nature of the prosecutor's commitment is unclear as to whether it was a firm or "best efforts" commitment to obtain Palermo's parole. In all events, it is clear that neither the Parole Board nor Parole Commissioner Jones made any commitment to anyone other than to give consideration to a petition for early parole. By releasing Palermo who was serving a sentence of up to 25 years imposed by the Richmond County court, the majority enforces a promise by Mackell for early parole even though it would seem questionable to the ordinary, reasonable man whether such a promise when made was within the power, authority or jurisdiction of the district attorney of Queens County. Indeed, Palermo himself, was suspicious and asked for assurances that the parole promise would be performed.

In this frame of reference, I join in the majority's condemnation of the prosecutorial misconduct in making commitments and representations that were knowingly false in that Mackell and Ludwig had no assurance at any time from the Parole Board regarding Palermo's parole. Courts prohibit such prosecutorial misconduct from depriving a defendant of his constitutional rights and accordingly order relief, if possible, in the nature of specific performance of the prosecutor's promise, or in the alternative, the withdrawal of the defendant's guilty plea. *Santobello* v. *New York*, 404 U.S. 257 (1971).

Prosecutorial Promises Involving Other Jurisdictions

In a case of this kind, however, release of a defendant under the guise of specific performance of an unauthorized and in fact, an unfulfillable promise by the district attorney disrupts the state administration of justice and

usurps governmental agencies outside of the jurisdiction or authority of the prosecutor. *See United States* v. *Long*, 511 F.2d 878 (7th Cir.), *cert. denied*, 423 U.S. 895 (1975); *United States* v. *Boulier*, 359 F. Supp. 165 (E.D.N.Y. 1972), *aff'd on other grounds sub nom. United States* v. *Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973). In this case it appears that streetwise Palermo, who knew the whereabouts of several million dollars worth of stolen jewelry, assuming that he is not guilty of the theft, was able to extract from the prosecutor an unauthorized promise not binding upon other independent governmental agencies or jurisdictions of the government, and thereby obtain immediate release because those independent authorities failed or refused to perform a promise they never made. The district attorney of Queens County operates within specified geographic jurisdictional boundaries,[1] and consequently he has no justification for proscribing the authority and obligations of the district attorney elected[2] in Richmond County, nor of the New York State Board of Parole which is the sole body charged by law with determining who shall be released among inmates serving indeterminate sentences, and under what conditions.[3]

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[1] N.Y. County Law § 700(1) (McKinney's 1972); N.Y. Criminal Procedure Law § 20.40 (McKinney's 1971); *People* v. *Dorsey*, 176 Misc. 932, 29 N.Y.S.2d 637 (Queens Co. Ct. 1941); Nadjari, *New York State's Office of the Special Prosecutor: A Creation Born of Necessity*, 2 Hofstra L.Rev. 97, 112-14 (1974).

[2] N.Y. Constitution Art. 13, § 13(a) (McKinney's Supp. 1975-76).

[3] N.Y. Correction Law § 210 (McKinney's Supp. 1975-76); *People ex rel. Washington* v. *LaVallee*, 34 App.Div.2d 603, 308 N.Y.S.2d 628 (3d Dep't), *motion for leave to appeal denied*, 27 N.Y.2d 481, 312 N.Y.S.2d 1025 (1970); *People ex rel. Smith* v. *Deegan*, 32 App.Div.2d 940, 303 N.Y.S.2d 789 (2d Dep't 1969). In order to parole a prisoner the Board of Parole must be of the opinion that "there is reasonable probability that, if such prisoner

(footnote continued on following page)

Therefore, it would seem to me that instead of releasing the defendant forthwith as though he had been placed on parole, consideration must be given to fashioning a remedy which is more in harmony with the fundamental structures and principles of state and federal governments.

Here, the alternative of permitting Palermo to withdraw his guilty plea is under the circumstances meaningless, and moreover, under no circumstances could the prosecutor return to the thief or his accessory $4 million worth of jewelry. Therefore, we are faced with the dilemma of being unable to effectuate a form of specific performance of the prosecutor's promise or to place Palermo back in the status quo, which to say the least was tainted with illegality.

Mackell, unlike prosecutors in the usual case whose interest is to obtain testimony for pending prosecutions, was acting under duress to retrieve the stolen jewelry deposited as collateral for loans by thousands of Queens residents. In exchange for his promise to return the jewelry Palermo succeeded in extracting from Mackell *ultra vires* promises. The majority, I believe, dismisses too quickly the reasoning in *United States* v. *Gorham,* 523 F.2d 1088 (D.C. Cir. 1975), in which a prison director held hostage by inmates promised there would be no repisals or court action against the inmates. The *Gorham* court stated that even if the promise had been made with authority, it was voidable since, among other reasons, it was induced by duress. Palermo's refusal to divulge the identity or location of those who possessed the stolen jewelry violated the law[4]

(footnote continued from preceding page)

is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society." N.Y. Correction Law § 213 (McKinney's Supp. 1975-76).

[4] Palermo was required to disgorge or divulge the whereabouts of the jewelry prior to, and apart from any agreement with the district attorney. N.Y. Personal Property Law § 252 (McKinney's 1976); N.Y. Penal Law §§ 205.50(1), (4), (5), 205.55 & 205.60 (McKinney's 1975).

and subjected the prosecutor to a form of duress, rendering the promise unenforceable at least as far as equitable relief is concerned. Therefore, referring to specific performance involving immediate release, he does not stand in the same shoes as those, who, for instance, under a plea bargain agree to cooperate and testify to assist the government in obtaining convictions of other defendants.

It is true that the courts do hold a prosecutor not only to promises which may be fulfilled, but also to some of those which are unfulfillable. But in all such cases the unfulfillable promise was not specifically enforced retroactively against other independent agencies or jurisdictions. The majority relies upon cases which I believe do not support the relief of immediate release. Though *Brady* v. *United States,* 397 U.S. 742, 755 (1970), does assert, in dicta, the proposition that an unfulfillable promise by a prosecutor which induces a plea of guilty constitutionally taints that plea, the Court does not purport to distinguish among the several categories of unfulfillable promises nor does it specify the appropriate relief to be granted. *Santobello, supra,* cited as authority for granting immediate release in this case as specific performance, is inapposite since *Santobello* concerned a direct appeal involving a single criminal conviction in one jurisdiction. The *Santobello* Court did not mandate the relief granted here where the prerogatives and responsibilities of other agencies and public officials are implicated by *ex post facto* interference by a powerless district attorney making unauthorized promises.

Similarly, I do not believe that *United States* v. *Carter,* 454 F.2d 426 (4th Cir. 1972) *(en banc), cert. denied,* 417 U.S. 933 (1974), is apposite. There, a federal prosecutor in the District of Columbia allegedly promised that no criminal charges would be brought in any jurisdiction concerning a group of stolen checks other than a mis-

demeanor charge for which the defendant was pleading guilty. Nevertheless, a criminal indictment was later brought in the Eastern District of Virginia, and the court of appeals in that case, by its own decision, determined that it would honor the promise by the prosecutor in the District of Columbia. Here, however, the promise concerned a previous conviction for an unrelated crime and none of the concerned authorities who possessed the power to grant the promised relief ever promised the relief.

Remedy

The question then is what is the appropriate relief under the circumstances. Other courts in the past have faced similar problems. In *Geisser* v. *United States, supra,* the federal government entered into a plea bargain with the defendant providing that if she pleaded guilty and provided indispensable evidence against others she would not be confined for more than three years and the government would use its best efforts[5] to prevent her deportation to Switzerland or France following incarceration. She then sought habeas relief since there was an outstanding warrant for her deportation to Switzerland, and the federal Board of Parole failed to honor the government's commitment concerning the three year limit of incarceration. The Department of State and the Board of Parole were not informed of the bargain, and when the petitioner applied for parole the Department of Justice disavowed the agreement and actively opposed parole and the Board of Parole denied the request. On the habeas petition, the district court granted immediate release, and the court of appeals vacated the lower court's decision and remanded, stating at 513 F.2d at 869:

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[5] The court of appeals assumed a best efforts promise, though the district court found an absolute commitment. 513 F.2d at 869, 872.

> We recognize that in a structure of independent quasi-adjudicative agencies within an Executive department there is and should be no hierarchical intrusion into the exercise of administrative discretion. At the same time, that agency needs to be advised in positive terms of the agreements made, the consequences of which were (i) rich in terms of the public interest and (ii) of constitutional consequences to the bargainee if not honored.

and again at page 871:

> Sharing as we do the Government's concern about judicial intrusion into the parole process, we defer until after remand whether we would put our stamp of approval on the District Judge's order which in effect releases Bauer at the end of the reconstructed three-year term.

The *Geisser* court ordered resubmission of the parole request to the Board and then provided that if the petitioner was not released on parole the district court "shall conduct further hearings after allowing fullest discovery on all issues and particularly on the question of just what has been done with the promise 'to use our best efforts' and the reason why, if any, steps have not been taken or why they have been ineffectual." *Id.* at 872.

In *United States* v. *Carter, supra,* Judge Boreman dissented upon the ground that Carter was not entitled to the relief sought under any theory, reasoning that "the United States Attorney's office for the District of Columbia could not enter into a valid plea bargaining agreement to bind the district court and the federal prosecutor in another jurisdiction with respect to separate and wholly different crimes committed outside the District of Columbia." *Id.* at 431. Among other things, Judge Boreman stated that "[t]he executive officials and courts of the

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Eastern District of Virginia should not be prevented from seeking to punish crimes victimizing the people of that district because an official elsewhere has overstepped the limits of his power." *Id.* He suggested as a remedy that Carter move for a reduction of sentence in Virginia, or else that he be considered for executive clemency.

For the reasons above indicated I do not believe that our "zeal to right the wrongs of prosecutorial excess," *Martin* v. *Merola,* 532 F.2d 191, 198 (2d Cir. 1976) (separate statement of Gurfein, *J.*), should induce us to grant, in effect, specific performance of an unauthorized and unfulfillable promise involving the intrusion into the exercise of administrative discretion of a wholly independent agency. For such excesses other remedies such as removal of the prosecutor from office are available. N.Y. Constitution Art. 13, § 13(a) (McKinney's Supp. 1975-76). Since the stolen property cannot be returned to Palermo a form of rescission is impossible. I am not too disturbed by this fact since Palermo had no interest in the property and had an obligation to return it in the first place. While a completely equitable solution may not be possible under the circumstances, I would do the next best thing by permitting Palermo to withdraw his Queens County plea of guilty if he so desires, for whatever it is worth, and at the same time I would construe the promise made of early parole as a "best efforts" promise. I would direct the present Queens County district attorney to make every effort on behalf of Palermo before the Parole Board to obtain such early parole. This result would recognize the sovereignty of the Board and probably grant Palermo a significant chance of immediate release. If the Parole Board fails to take action Palermo's alternative would be to petition for executive clemency.

I would affirm as to the cross-appeal concerning the damage action against Mackell and Ludwig and also affirm the denial of attorney's fees and costs to Jones and Oswald.

Appendix "B".

Thomas PALERMO and Sheldon Saltzman, Plaintiffs,

v.

Russell OSWALD et al., Defendants.

No. 70 Civ. 3705.

United States District Court, S. D. New York.

April 22, 1976.

Elliot A. Taikeff, New York City, for plaintiff Palermo.

Harry L. Simmons, New York City, for plaintiff Saltzman.

Louis J. Lefkowitz, Atty. Gen. of State of N. Y., by Ralph L. McMurry, Robert G. Farrel, New York City, for defendants Oswald, Jones, Doe and Roe.

Bernard Richland, Corp. Counsel, by William J. Walls, New York City, for defendant O'Connor.

OPINION

GRIESA, District Judge.

This action was commenced in 1970 at a time when plaintiffs Palermo and Saltzman were both New York State prisoners. They sued various defendants seeking damages and an order that they be released from prison and certain other relief.

The complaint was brought under 42 U.S.C., Sections 1983 and 1985, alleging violations of plaintiffs' constitutional rights. Basically, the allegation was that Queens County District Attorney Mackell and other officials, including members of the New York Parole Board, had par-

ticipated in making an agreement in October 1969 with Palermo and Saltzman which induced these men to arrange for the return of $4,000,000 in jewels stolen from the Provident Loan Society. The allegation in the complaint was that this agreement also induced Palermo and Saltzman to plead guilty to the Provident Loan Society robbery. The complaint alleged that various considerations were agreed to, the main ones being that Palermo and Saltzman would receive suspended sentences or discharges by the Queens County Court on the Provident Loan Society matter and that they would be paroled in August 1970 on sentences which they had received in Richmond County on another case.

Shortly after the action was brought there were motions made to dismiss the complaint. These motions were heard by the then District Judge Mansfield who filed a decision on January 15, 1971, which is reported at 323 F.Supp. 478. Judge Mansfield stated, at page 485 of that decision:

> ". . . it is a fundamental prerequisite of the plea negotiation process thatt the representations made to the defendant be accurate, and that promises made to him be kept . . ."

Judge Mansfield held that the complaint stated a valid claim against Parole Commissioners Oswald and Jones and other parole commissioners named as John Doe defendants, in that the complaint alleged that the parole board members had promised parole to Palermo and Saltzman on the Richmond County charge and had failed to keep that promise. Judge Mansfield refused to dismiss the complaint as to Oswald, Jones and other parole commissioners named as John Doe defendants. Judge Mansfield also denied the motion to dismiss the case as to a New York City detective named John O'Connor, who had participated in the plea negotiations. Judge Mansfield held that there was no immunity or other legal reason for dismissal as to O'Connor.

However, the complaint was dismissed as against most of the defendants for various legal reasons. Most of Judge Mansfield's discussion in this connection is irrelevant to our present problems except that which deals with District Attorney Mackell and Chief Assistant District Attorney of Queens County Ludwig. Mackell and Ludwig were both named as defendants in the original complaint. As to these defendants Judge Mansfield stated, at page 485 of the opinion:

> "The present complaint, however, is limited to a general charge that the defendants failed to fulfill the commitments made, a failure that could have occurred even though they used reasonable diligence, since the power to grant parole rested with the Parole Board and not with the prosecutorial defendants."

However, Judge Mansfield also stated at the same page:

> "If it were alleged that these prosecutorial defendants had entered into the alleged agreement with knowledge that the agreement would in all probability not be performed, we would be inclined to uphold the complaint on the ground that a compelling justification exists for charging them with immunity, since both agreements touch at the heart of such liberties as are embodied in the presentation of innocence and the right to a pretrial, and public policy accordingly dictates that the conduct of officials entering into such agreement be measured by a high standard of ????? faithfulness and respect for constitutional rights."

Judge Mansfield gave the plaintiffs thirty days to file an amended complaint against any of the defendants dismissed from the case, and an amended complaint was filed within the thirty day period referred to by Judge Mansfield.

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There was a motion to dismiss the amended complaint in response to which Judge Mansfield filed a decision July 26, 1971. Basically, Judge Mansfield left the case in the same posture as in the first decision. The case was left standing as against defendants Oswald, Jones, O'Connor and the John Doe defendants. Although the amended complaint attempted to allege causes of action against other defendants including Mackell and Ludwig, Judge Mansfield held that the amended complaint should be dismissed as against these other defendants. At this time Palermo and Saltzman were pro se. No final judgment was entered as to the dismissed defendants, so that presumably any right of appeal will accrue as of the time that final judgment is entered following the present proceeding.

The case was dormant for a time. Then counel was obtained for plaintiffs. Following a decision of the United States Supreme Court in *Preiser* v. *Rodriguez,* 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439, 1973, there were certain motion proceedings in the present case. The *Preiser* decision held that a Section 1983 claim for injunctive relief in the form of release from prison must be treated as a habeas corpus petition with the attendant requirement of exhaustion of state remedies.

The Attorney General of New York moved in the present case to dismiss the injunction phase of the case, alleging that state remedies had not been exhausted.

It is conceded that Saltzman did not exhaust his state remedies. Also Saltzman was released on parole in July 1974. Therefore, there is no claim in the present case for any injunctive or habeas corpus relief on the part of Saltzman. The only thing to which such a request for relief could relate would be Saltzman's present parole status, but there is no claim for habeas relief in this case with respect to Saltzman's parole status.

As to Palermo, the State eventually withdrew its defense of failure to exhaust state remedies. Indeed, the record

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indicated that Palermo had made a strenuous effort to use state remedies and had been met by a bewildering array of procedural difficulties. I am convinced that Palermo exhausted his state remedies and that there is jurisdiction in the present action to entertain Palermo's habeas corpus request. The State does not contend otherwise.

It was basically in this posture that the case finally came on for trial. The claims for trial were, first, the damage claims of both Palermo and Saltzman against former Parole Commissioners Oswald and Jones.

It should also be noted that although certain other parole commissioners or former parole commissioners were named as John Doe defendants in the complaint, none of them was ever served with process or brought in as parties. Therefore, there has been no trial of any claims against any present or former parole commissioner other than Oswald and Jones. To the extent that the record needs to be cleared on this point, the action is dismissed as against all the John Doe and Richard Roe defendants, the anonymous parole commissioners.

Now, continuing with the issues for trial, there was also the damage claim against Detective O'Connor. In addition, as already noted, the habeas corpus claim of Palermo needed to be determined by the trial. It should be noted that Palermo was considered for parole in June 1975, but parole was refused. He is supposed to be considered again in January 1977. Palermo is incarcerated at the Greenhaven Correctional Facility.

In order to have a defendant subject to an appropriate court order in the event the habeas petition of Palermo were to be granted, the State consented to the joining of the Warden of Greenhaven as a party defendant.

[1] The trial commenced April 19, 1976. A jury was empaneled to try the damage claim. The habeas claim, of course, was for determination by the Court without the jury.

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At the conclusion of all the evidence on April 21, I held that there was insufficient evidence to submit any of the damage claims, that is, the claims against Oswald, Jones and O'Connor, to the jury and I dismissed the case as against these defendants.

This leaves for determination the habeas corpus claim of Palermo. The following are my findings of fact and conclusions of law on this claim.

On February 17, 1969, Palermo and Saltzman were scheduled for trial on a robbery charge in Richmond County. They were late for the trial. During the morning when the trial was supposed to start the Jamaica branch of the Provident Loan Society was robbed of several million dollars in jewelry. Palermo and Saltzman appeared for trial in Richmond County in mid-day of February 17, 1969.

Palermo and Saltzman were found guilty on the Richmond County charge late in February, 1969.

The verdict in that case was followed by several appearances in the next weeks by Palermo and Saltzman for sentencing in Richmond County. The sentence was adjourned several times. The apparent reason for these adjournments was to give time for the authorities to discuss with Palermo and Saltzman cooperation in obtaining the return of the Provident Loan Society jewelry stolen in Jamaica on February 17th.

Palermo and Saltzman were suspected of guilt in connection with the Provident Loan Society robbery. Indeed, Saltzman now firmly admits his participation in this robbery. On the other hand, Palermo firmly denies any participation in the Provident Loan Society robbery. In any event, they were both suspects in this robbery in the spring of 1969 and they were both arrested for this robbery in May 1969. At the time of these arrests Palermo and Saltzman were being detained awaiting sentence on the Richmond County conviction. There were various negotiations before the Richmond County sentence occurred in late June

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1969, but no agreement was reached with respect to the return of the Provident Loan Society jewelry or any of the relevant proceedings.

In late June 1969 Palermo was sentenced to an indeterminate term of zero to twenty-five years in the Richmond County case and Saltzman was given an indeterminate term of zero to fifteen years in that case.

On July 6, 1969 Palermo and Saltzman were sent to Sing Sing. This was the commencement of their term of incarceration in a State prison, as distinct from a county jail or a house of detention. They had been incarcerated in the Richmond County House of Detention or jail since February 1969.

I should note here that in the discussions with Palermo and Saltzman relating to possible parole or an agreement for parole in connection with the Richmond County conviction, there were various descriptions of the time for that proposed parole. The testimony at times refers to a parole in one year. At other times the testimony refers to a parole in eighteen months. At other times the testimony refers to parole in August 1970. In the context of this case all of these different terminologies refer to the same thing.

It appears that for an indeterminate sentence, such as was given to Palermo and Saltzman, the minimum time which could be served in a state prison, as distinct from a house of detention or a jail, was one year. This would be one year commencing in July 1969, and apparently the parties were under the impression that this would expire in August 1970. The eighteen months refers to the eighteen months starting with the commencement of incarceration in the Richmond County House of Detention or jail, and that would also expire in about August 1970.

Getting back to the chronology, the next relevant event is that on July 17, 1969 Palermo and Saltzman were brought back from Sing Sing to the Queens House of Detention for

discussions regarding the Provident Loan Society robbery and the charge against them for that robbery then pending in Queens County.

It is clear that Queens County District Attorney Mackell had an intense interest in obtaining the return of the jewels taken from the Provident. The stolen jewels amounted to several million dollars in value and had been pledged to the Provident by over 2,000 Queens residents who had borrowed money from the Provident on this jewelry. In addition, the Provident Loan Society and its insurer had a similar intense interest in having the jewelry returned. The law firm of Rein, Mound & Cotton was retained by the Provident and its insurer. Lawyers for that firm were active and instrumental in the plea bargaining negotiations which occurred.

Shortly after Palermo and Saltzman returned to Queens County from Sing Sing they were told of an offer. This offer was conveyed to them by their attorney, Bobbick. Bobbick said that Mackell and Mackell's assistant, Ludwig, offered the following terms. Palermo and Saltzman would be re-sentenced in the Richmond County case to 7 years and 5 years respectively. However, Palermo and Saltzman would be paroled on that case in one year from the time they arrived in Sing Sing in July 1969; a reward of $100,000 would be paid to Palermo and Saltzman for the return of the jewels; Palermo and Saltzman would plead guilty to the Queens County charge and receive suspended sentences or discharges. Palermo and Saltzman indicated to Bobbick this arrangement was acceptable.

It appears that in general Saltzman desired to have Palermo be the spokesman on behalf of the pair in the negotiations, and indeed certain of the meetings were held by Palermo without the presence of Saltzman. However, when such meetings were held Palermo would relay the offers or the information to Saltzman.

A few days after the visit by Bobbick, which I described above, Palermo received a visit from Detective O'Connor and from an attorney named Evseroff. O'Connor was acting on occasion as a liaison between Mackell's office and Palermo and Saltzman. Evseroff had represented Palermo at one stage of the Richmond County case. It is not completely clear why Evseroff appeared at this juncture in the Queens negotiations, but he was there.

Evseroff stated that Bobbick had misrepresented the situation. Evseroff stated that there could be no re-sentencing in the Richmond County case and there could be no reward of $100,000. But Evseroff said that there was a new offer from the Queens District Attorney's office, and he proceeded to present this offer. Evseroff stated, in O'Connor's presence, with O'Connor doing some of the talking apparently, that the present 25 and 15 year sentences imposed in Richmond County would remain, but that parole would occur in eighteen months from the time of the original incarceration in February 1969. The result, as I indicated earlier, would be that the parole would occur in about August of 1970. Parole supervision would be the minimum permissible terms of five years. Evseroff and O'Connor stated that if Palermo and Saltzman pleaded guilty to the Provident Loan robbery in Queens County they would receive suspended sentences there. Certain other elements were discussed which are not necessary to be described here.

Palermo asked how they could be assured regarding the parole. At this point O'Connor and Evseroff went to see Ludwig in the District Attorney's office. They presented the problem, at which time Ludwig retired into another room. Shortly thereafter he came back and reported to O'Connor and Evseroff, that he, Ludwig, had spoken to the parole board and one or more representatives of the parole board had indicated that upon the District Attor-

ney's recommendation the board would extend early parole to Palermo and Saltzman. This meant to Evseroff one year from July, 1969, the minimum prison time which could be served.

O'Connor and Evseroff reported this conversation to Palermo and stated that Ludwig had spoken to a parole commissioner and that Ludwig said that the parole commissioner thought that the parole board would accept the recommendation of the Queens County District Attorney. Palermo's testimony indicates that the parole commissioner referred to in the conversation as reported to him was Commissioner Jones.

Following this meeting Bobbick re-entered the picture. Bobbick and Norman Rein of the firm of Rein, Mount & Cotton, visited Palermo two or three times. After some initial confusion in these discussions, Bobbick and Rein stated there could be no change in the 25 and 15 year Richmond County sentences, but conveyed the offer for parole on those sentences of one year from July 1969, and suspended sentences on the Queens County robbery charge. Apparently Bobbick and Rein were also indicating that a reward of $100,000 might be paid. The testimony does not explicitly indicate that there was a discussion of the five year limit on the term of parole supervision. However, it was either implicit or explicit that this was part of the offer. Again, there were certain other considerations discussed which do not need to be described here.

About October 10, 1969, two members of the Rein firm, namely Arthur Brook and Eugene Leiman, met with parole board Commissioner Jones. Also present was Detective Caparell representing the Queens District Attorney's office in that discussion. Leiman and Brook indicated that they sought assurances from Jones that Palermo and Saltzman would be paroled in eighteen months, namely, in August 1970. Exactly what Jones said is somewhat in doubt. However, the gist of the testimony is that Jones indicated

that the parole commissioners would consider the request made for the parole in August 1970, but also indicated that no commitment whatever would be made by the parole board to any specific parole.

I should note that at some point before the October 10, 1969 meeting with Commissioner Jones, there was a private conversation between O'Connor and Saltzman. This occurred in the Queens House of Detention. At this time O'Connor said that Palermo and Saltzman would never get a better deal than the promised eighteen months in jail, so that they would be home by next August. O'Connor urged Saltzman to accept this deal.

Returning to the time of the meeting with Commissioner Jones, I find that Palermo and Saltzman were never cautioned in any way regarding the absence of a commitment from the parole board. Indeed, Palermo and Saltzman were led to believe that there was a firm understanding that they would be paroled at the August 1970 time, after the year or the eighteen months, however one calculates it. Indeeed, Bobbick advised Palermo after the meeting with Commissioner Jones that the meeting had been successful and that there was a deal for parole at the requested time.

The final agreement was reached on October 24, 1969. The first meeting that day occurred between Palermo and O'Connor, Rein and Bobbick. The same offer as made before was reiterated, namely, the one year parole on the Richmond County case, the suspended sentences or discharges on the Queens County robbery case and other considerations, including apparently, the $100,000 reward. Again I find that plaintiffs were led to believe, either implicitly or explicitly, that they would receive the minimum parole supervision of five years following their release on parole.

Palermo stated that the deal was acceptable. However, later in the day O'Connor, Bobbick, and Rein returned to

see Palermo and stated that District Attorney Mackell would not consent to the $100,000 reward.

Palermo stated that the deal was satisfactory without the $100,000 reward. At this point Palermo was taken to the office of Ludwig. Palermo asked to have Ludwig personally confirm the agreement. Ludwig stated that it was agreed that Palermo and Saltzman would be released on parole on the Richmond County charge in the year time requested, and the Queens County robbery charge would be dealt with by either discharges or suspended sentences. Again I find that in addition plaintiffs were led to believe, either expressly or implicitly, that they would also have the benefit of the minimum five-year time for parole supervision after release on parole. The details of the October 24th negotiations were relayed to Saltzman and approved by him. Of course, the consideration due from Palermo and Saltzman in connection with the agreement and the offers was to return the jewelry and to plead guilty to the Queens County robbery.

Following the conference with Ludwig at which the agreement was confirmed, Palermo made certain telephone calls upon the instruction of Saltzman. Palermo then took the authorities to 40th Street in Manhattan by the East River. At that point $4,000,000 worth of the jewelry from the Provident Loan Society robbery was recovered in a car at that location.

During the discussions leading to the October 24th agreement District Attorney Mackell had various meetings with Bobbick and also with Rein and Rein's partner Arthur Brook. Mackell stated that he would "make it a career" to see Palermo and Saltzman would serve the minimum prison sentence, which would mean the one-year period, and that Mackell would "break his back" to this end.

Following the return of the jewelry Mackell issued a press release announcing the return of the jewelry. The release

stated twice that this was the largest recovery of stolen propery in the history of law enforcement.

It appears that the $4,000,000 in jewelry was not all of the jewels stolen from the Provident Loan Society. An estimate has been made that approximatley $1,000,000 worth of jewelry was not returned. However, at no time did District Attorney Mackell or anyone from his office register any complaint to Palermo and Saltzman to the effect that they had in any way breached the agreement or failed to carry out their part of the agreement.

The evidence in this case has explored in some detail numerous events occurring following October 24, 1969. Only a few of them need to be mentioned here. One salient event occurred about December 15, 1969. At that time it appears that an employee of the parole board by the name of McCarthy telephoned Assistant District Attorney Ludwig and discussed with him the attempt to have some arrangement made for early parole of Palermo and Saltzman. McCarthy took a very jaundiced view of any lenient treatment of Palermo and Saltzman. McCarthy stated that Palermo and Saltzman were not entitled to any consideration of any type whatsoever by any agency.

Contrary to the express agreement made by Ludwig and his superior, Mackell, that they would bend every conceivable effort to carry out the agreement and to obtain the minimum prison time and early parole for Palermo and Saltzman, Ludwig replied to McCarthy as follows. Ludwig expressed his agreement with the attitude of McCarthy and added that the case reminded him of Murf the Surf, involved in the robbery of the American Museum of Natural History where leniency was granted after some restitution of the stolen property and this was followed by a violent crime by the person who had been treated leniently. This volunteered opinion of Ludwig, as I say, clearly violated the letter and spirit of the agreement made by Ludwig and Mackell.

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The comment of Ludwig was important enough to record in a lengthy memo prepared by McCarthy which was circulated to various parole board officials and placed in numerous files.

On April 16, 1970 Palermo and Saltzman entered guilty pleas to the robbery charge in Queens County. The parole hearings for Palermo and Saltzman were scheduled for the end of April. The purpose of these hearings was to set the minimum sentence to be served under the indeterminate 25 and 15 year sentences imposed in Richmond County. The lowest minimum sentences which the parole board could set were the one year terms from July 1969 which had been the subject of the many discussions and had been purportedly agreed upon by Mackell and Ludwig.

In preparation for the April hearings, Mackell wrote a letter to Russell Oswald, Chairman of the Board of Parole, which did indeed recite the cooperation of Palermo and Saltzman in obtaining the return of the property, the stolen jewelry. The letter enclosed the press release which had been issued by Mackell at the time of the return of the jewelry. However, Mackell's letter made no reference to the commitment by his office to the one-year term. Although the letter stated that lenient treatment was requested, the letter must be viewed as somewhat ambiguous and less than the vigorous action which had been promised.

In light of Ludwig's private statement to the parole board through McCarthy, the letter is less than an effective representation of the interests of Palermo and Saltzman in carrying out the agreement which Mackell and Ludwig had entered into.

At the same time Norman Rein of the firm of Rein, Mound & Cotton wrote a vigorous letter to the parole board recommending "extreme leniency" in the treatment of Palermo and Saltzman.

For various reasons no hearing was held in April. However, parole hearings were held for both Palermo and Saltz-

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man in June, 1970. The transcripts of these hearings are in evidence. Both Palermo and Saltzman made fervent pleas with respect to what they believed to have been agreed, namely, that they would be paroled in the one year time.

The hearings were dealt with by a panel of three parole commissioners, namely, Regan, Lewis and Gross. The commissioners advised Palermo and Saltzman that no commitment whatever had been made by the parole board and that they would treat the case entirely without respect for any such commitment.

In the case of Palermo, the panel fixed the minimum term of imprisonment as six years. In the case of Saltzman, the minimum period of imprisonment was fixed at five years. The decisions of the panel are not reviewable and were not reviewed by other parole commissioners or the full parole board of twelve persons.

It appears that some representative of the Queens District Attorney's office requested to attend the parole hearings at the prison. Who that was is not shown by the record. The testimony about that is vague in the extreme.

However, it is perfectly clear, and the record so demonstrates, that steps were open to District Attorney Mackell's office to take far more vigorous action to carry out the agreement with Palermo and Saltzman than was taken. Apparently the policy of the parole board is that outsiders, such as representatives of a district attorney's office are not permitted to actually appear at the parole hearings held in the prison. However, it is perfectly permissible to have persons such as representatives of a district attorney's office meet with the panel of the parole commissioners outside of the prison and present any views which should be presented. No attempt at such a meeting was made.

August 1970 passed and neither Palermo nor Saltzman was released on parole.

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In the late fall of 1970 Palermo moved to withdraw his guilty plea on the Queens County robbery charge. This motion was denied. However, the Queens County sentencing judge discharged both defendants at the time of the sentence, which occurred January 11, 1971.

Now, let me summarize my conclusions.

[2] I find that Palermo and Saltzman were induced to plead guilty to the Queens County robbery charge in connection with the Provident Loan Society robbery and were induced to return $4,000,000 in jewels, and that the inducements consisted of promises and representations made to them and to their attorneys by Ludwig and O'Connor that Palermo and Saltzman would be paroled in the one year period, namely in August 1970, in the Richmond County case, and that the period of time to be served on parole supervision after such release would be five years.

As to District Attorney Mackell, I find that the preponderance of the evidence demonstrates that Mackell knew of the representations of Ludwig, that is, the flat commitments that parole on the Richmond County charge would be in the one year time and that the period of supervision after such release would be five years. I cannot believe that Mackell was oblivious to the fact that Palermo and Saltzman were requiring some very specific commitments in return for their assistance with respect to the $4,000,000 in jewels and their guilty pleas.

I further find that Ludwig and Mackell knew that the commitments and representations made to Palermo and Saltzman about the August 1970 parole were false and knew that they had no commitment or assurance from the parole board regarding any parole time.

As to O'Connor, I find that there is no evidence that he was more than a messenger and there is no evidence that he knew of the falsity of the representations or commitments he was conveying.

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I further find that Mackell clearly violated his agreement to take all possible steps to have Palermo and Saltzman paroled in August 1970.

Consequently, we have a situation where a plea bargain was made, was made in bad faith on the part of the prosecuting authorities, and it was not carried out.

[3] The question arises as to what relief should be granted. *See Santobello v. New York,* 404 U.S. 257, 263, 92 S.Ct. 495, 499, 30 L.Ed.2d 427, 433 (1971). It is clear to me that one possible alternative discussed in the cases would be completely meaningless here, and that alternative is the opportunity to withdraw a guilty plea. *See United States ex rel. Selikoff v. Commissioner of Correction of State of New York,* 524 F.2d 650 (2d Cir. 1975). Obviously, it would mean nothing whatever to permit a withdrawal of the guilty pleas in Queens County.

With respect to the causes of action for damages, I have already noted the fact that the causes of action against Mackell and Ludwig were dismissed on the pleadings by Judge Mansfield. The defendants which Judge Mansfield allowed to remain in the case subject to damage claims have been dismissed by me because the evidence did not substantiate such claims. Whether or not there would be valid damage claims against Mackell and Ludwig, is a matter which I cannot decide at the present juncture. Whether Judge Mansfield's dismissal of the claims against Mackell and Ludwig will be overturned on appeal and whether the claims against them will be reinstated is something that is a matter for the appellate process.

In the present circumstance the only meaningful and reasonable way to grant relief is to order the release of Palermo and grant the writ of habeas corpus.

For the reasons stated above I am directing that Palermo be immediately released from incarceration and that he be released unconditionally, not subject to parole. If

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the plea bargaining agreement had been carried out, he would have been released in August 1970 and the five year parole supervision time would have expired in 1975. All of these time periods have expired.

The parties are directed to submit an appropriate judgment.

Appendix "C".

Thomas PALERMO and Sheldon Saltzman, Plaintiffs,

v.

Nelson A. ROCKEFELLER, Russell Oswald, E. K. Jones, John Doe, Richard Roe (Parole Board Commissioners), Thomas Mackell, Fred Ludwig, Thomas Demaskos, Arthur A. Darrigrand, John A. Braistead, Mr. Ralph DiIorio, Peter T. Farrell, Michael Kern, John V. Lindsay, Howard Leary, John O'Connors, Norman Rein, Esq., Jacob Esveroff, Esq., the Provident Loan Society, the State of New York, the City of New York, Defendants.

No. 70 Civ. 3705.

United States District Court,
S. D. New York.

Jan. 15, 1971.

Thomas Palermo, pro se.

Sheldon Saltzman, pro se.

Louis J. Lefkowitz, Atty. Gen. of the State of New York, New York City, for defendants Rockefeller, Oswald, Doe, Roe, Mackell, Ludwig, Demaskos, Darrigrand, Braistead, DiIorio, Farrell, Kern and State of New York; Stephen P. Seligman and Frank I. Strom, II, Deputy Asst. Atty. Gen., of counsel.

J. Lee Rankin, Corp. Counsel, New York City, for defendants Lindsay, Leary, O'Connors and City of New York; John Wellekens, New York City, of counsel.

Rein, Mound & Cotton, New York City, for defendants Norman S. Rein and Rein, Mound & Cotton; Eugene A. Leiman and James S. Rowen, New York City, of counsel.

DeForest & Duer, New York City, for defendant Provident Loan Society of New York.

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MANSFIELD, District Judge.

This action brought under 42 U.S.C. §§ 1983 and 1985 and 28 U.S.C. § 1343(3) and (4) involves alleged non-compliance with the terms of an elaborate agreement allegedly worked out between plaintiffs, who are now incarcerated at Sing Sing Prison, and defendants, all of whom are alleged to have been either directly or indirectly connected with the agreement.

On February 17, 1969, when plaintiffs were scheduled to appear for trial in the New York Supreme Court for Richmond County on charges of robbery and grand larceny, a robbery was committed in Queens County in which 2,000 pieces of jewelry valued at approximately $4,000,000 were taken from the Provident Loan Society of New York ("Provident"). On June 11, 1969, a grand jury in Queens County indicted plaintiffs for the Provident robbery. On June 27, 1969, plaintiffs were convicted by a jury in Richmond County of robbery in the first degree, convictions based on incidents unrelated to the Provident robbery. Plaintiff Palermo was sentenced to imprisonment of 25 years on the robbery count and 7 years on the larceny charge; plaintiff Saltzman was sentenced to 15 years and 5 years on the corresponding counts. All of the sentences were to run concurrently.

In an effort to recover the jewelry taken in the Provident robbery, negotiations were conducted, beginning during the Richmond County trial, between the District Attorney for Queens County, Thomas J. Mackell ("Mackell"), and plaintiffs who were represented by their attorney, Jacob R. Esveroff ("Esveroff"). It also appears that a representative of the New York City Police Department, Mr. John O'Connors ("O'Connors"), and an attorney for Provident, Norman Rein ("Rein"), were present at and participated in the negotiations to some extent. After some deliberation, plaintiffs agreed to procure the return of the proceeds

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of the Provident robbery and to plead guilty to the charges against them arising from it. Mackell agreed to appear at plaintiffs' sentencing on the foregoing guilty pleas in Queens County Court, to intercede on behalf of plaintiffs with the New York State Parole Board ("Parole Board") in an effort to secure plaintiffs' release on parole after 18 months of their Richmond County sentences had been served, to move to dismiss an assault charge then pending against Palermo in Queens County, and to request the District Attorney of Oneida County to drop charges against plaintiffs relating to possession of a stolen automobile. Mackell rejected plaintiffs' request for a reward of up to $100,000 for return of the jewelry, but the other elements of the agreement were substantialy as requested by plaintiffs through their attorney.

On or about October 24, 1969, most of the proceeds of the Provident robbery were returned to Mackell's representatives. On April 16, 1970, plaintiffs pleaded guilty to the crime of robbery in the third degree in Supreme Court, Queens County, in connection with the Provident robbery. On April 24, 1970, Mackell wrote to the Parole Board requesting consideration for plaintiffs on their Richmond County sentences. This letter appears to have been unavailing, however, as the Parole Board denied plaintiffs' application for release on parole. Mackell also communicated with the Oneida County District Attorney regarding the charge of possession of a stolen motor vehicle. That charge is still pending against plaintiffs. On September 30, 1970, an Assistant District Attorney appeared in Queens County Supreme Court, in which plaintiffs were to be sentenced upon their guilty pleas to inform the sentencing judge that the proceeds of the robbery had been returned. At that time, Palermo moved to withdraw his plea of guilty because he had not been paroled as scheduled on August 17, 1970. The sentencing of both plaintiffs for their part in the Provi-

dent robbery was adjourned pending the determination of Palermo's motion. Hearings on the motion are now in progress in Queens County Supreme Court.

On August 25, 1970, plaintiffs commenced this action against numerous defendants alleging non-compliance with the agreement described above. They now seek unconditional release from custody, an injunction against the initiation or continuance of further prosecutions against them, an order for return of the jewelry which they returned to Provident, damages in the amount of $1,000,000 plus $25 for each day spent in custody beyond August 17, 1970, the date at which they allege they were to be released pursuant to the agreement, and reimbursement for the costs of prosecuting the action.

We deal now with motions made on behalf of each of the 22 defendants to dismiss the action. We shall deal with the motions of the defendants as they fall into the following categories, and in the following order: (1) the State of New York and the City of New York, (2) New York Supreme Court Justices Kern and Farrell, (3) Mayor Lindsay, former Police Commissioner Leary, and Governor Rockefeller, (4) attorneys Esveroff, Rein, and the firm of Rein, Mound & Cotton, (5) Provident, (6) defendant Darrigrand, Oneida County District Attorney, (7) various Parole Board officials, (8) various District Attorneys and their assistants in Richmond and Queens Counties, and (9) O'Connor.

Section 1983 provides a federal remedy for the actions of "persons." It is settled law that a state is not a person within the meaning of this section. Fear v. Commonwealth of Pennsylvania, 413 F. 2d 88 (3d Cir. 1969); Israel v. City Rent and Rehabilitation Administration of City of New York, 285 F.Supp. 908 (S.D.N.Y. 1968). The complaint is therefore dismissed as to the State of New York.

As to the defendant City of New York, the mandate of the Supreme Court is equally clear. "The response of the

Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by [§ 1983] was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." Monroe v. Pape, 365 U.S. 167, 191, 81 S.Ct. 473, 486, 5 L.Ed.2d 492 (1961) (footnote omitted). Fisher v. City of New York, 312 F.2d 890 (2d Cir.), cert. denied, 374 U.S. 828, 83 S.Ct. 1866, 10 L.Ed.2d 1051 (1963). Although this seemingly definitive pronouncement may not bar a suit when only injunctive relief is sought, Schnell v. City of Chicago, 407 F.2d 1084, 86 (7th Cir. 1969); Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961), and plaintiffs in this case seek an injunction among other things [Compl. ¶ 2(b)], plaintiffs primarily seek damages, recission, or specific performance of the agreement: the only form of injunctive relief which might issue against the City would be an injunction restraining further participation of its employees and agents in this and other plea negotiations, or perhaps merely restraining further breaches of agreements reached in such negotiations. Viewing the allegations in the complaint in a light most favorable to plaintiffs, it appears that the only agent of the City who was directly involved in the agreement to any extent was defendant O'Connors, who participated in the discussions leading to the agreement, personally received the jewelry, and then conveyed the jewels to Provident. It is not alleged that O'Connors has failed to comply with any promises that he may allegedly have made to plaintiffs. On these facts, an injunction against the City is unwarranted. The action against the City is therefore dismissed in all respects.

We next consider the allegations concerning Michael Kern and Peter T. Farrell, Justices of the Supreme Court of the State of New York. These allegation relate to the part which Justice Kern played in negotiations regarding the Provident robbery, consisting of discussions before trial in

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Richmond County, during trial, and prior to sentencing there. Compl. ¶ 5(a) and (b). Plaintiffs allege that references to those conferences are to be found in the trial minutes of the Richmond County case. Compl. ¶ 5(c), which are not now before us. It is alleged that plaintiffs were offered a maximum sentence of five years in the Richmond County matter if they would arrange for the return of the jewels, Compl. ¶ 5(d), and that plaintiffs were told that they would never be paroled if they did not arrange for the return of the jewels, Compl. ¶ 5(d), but these assertions are not attributed directly to either Judge Kern or Judge Farrell. The complaint, indeed, does not even allege that Judge Farrell participated in the plea negotiations.

[1] Section 1983 did not abolish the common law immunity of judges.

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litgants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967).

A judge is immune from suits, at least those seeking damages and not injunctive relief, cf. Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F.Supp. 117, 123 (S.D.N.Y.1969), arising from the performance of his duties as long as he is acting within the judicial role on matters that are within his jurisdiction, Bradford Audio Corp. v. Pious, 392 F.2d 67, 73 (2d Cir. 1968); Fanale v. Sheehy, 385 F.2d 866 (2d Cir. 1967).

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Since the criminal proceedings brought against plaintiffs in Richmond and Queens Counties were clearly within the jurisdiction of Justices Kern and Farrell, we need deal only with the question of whether the actions of these judges, assuming for purposes of the motion to dismiss that the allegations concerning their actions are true, departed sufficiently from the judicial role to justify depriving them of immunity, cf. Brown v. Dunne, 409 F.2d 341, 343 (7th Cir. 1969), clarifying Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963).

The Canons of Judicial Ethics, Canon 4 ("Avoidance of Impropriety"), has been construed to caution strongly against the direct involvement of judges in arranging guilty pleas:

> "A judge should not be a party to advance arrangements for the determination of sentence, whether as a result of a guilty plea or a finding of guilt based on proof." American Bar Association, Opinions on Professional Ethics 202 (1967) (Informal Opinion No. 779).

Cf. United States ex rel. Elksnis v. Gilligan, 256 F.Supp. 244, 255 (S.D.N.Y. 1966). Such involvement tends to demean the role of the court and can lead to unfairness or even to acceptance of a plea of guilty to a crime for which the defendant may not in fact be guilty.

There has been an increasing tendency, however, toward official recognition of the fact that plea negotiations between the prosecuting attorney and defense counsel are widespread and that they can facilitate the administration of justice under certain conditions. See, e.g., American Bar Association Project on Minimum Standards for Criminal Justice, Pleas of Guilty, Tentative Draft, pp. 10-12 (Part III, Plea Discussions and Plea Agreements). For instance, The Advisory Committee on Federal Rules of

Criminal Procedure has recently recommended the amendment of Rule 11, F.R.Cr.P. to permit the court to accept or reject a negotiated plea presented to it by counsel, provided the agreement is spread on the record and the court reserves the right to reconsider its acceptance if it later finds that the pre-sentence report contains information inconsistent with that disclosed by the parties at the time of the plea. In the latter event the defendant's not guilty plea is reinstated and the record of the plea negotiation and presentation is inadmissible at trial.

Some states would go even further in permitting the court to become involved in plea agreements. A revised rule recently proposed to the Supreme Court of Illinois would, for instance, permit the trial judge to participate in discussion of the plea agreement at the request of the defendant, Proposed Rule 402(d) (1) ("Pleas of Guilty"). The Illinois Committee Comments to the Proposed Rule, dated January 16, 1970, indicate that the Committee believes that there is no reason for prohibiting such participation when both the defendant and the judge consent.

[2] In light of the potential which plea agreements have for enhancing the efficiency of the criminal process, a particularly important consideration in a time of long dockets and serious delays of trial, we cannot say that participation of a trial judge in plea negotiations is a *per se* deparature from the judicial role in which a judge is immune from suit, cf. United States ex rel. Rosa v. Follette, 395 F.2d 721 (2d Cir. 1968). Moreover, viewing the facts as alleged in the complaint it does not appear that plaintiffs have been damaged by any acts of these two defendants stemming from their alleged participation in negotiations leading to the agreement. There is no allegation, for example, that either judge made promises concerning the imposition of a five-year sentence in the Richmond County matter. Therefore, the action against

defendants Kern and Farrell is dismissed since they are immune from suit on the facts alleged.

[3] Plaintiffs further allege (1) that as Mayor of the City of New York and former Commissioner of its Police Department defendants Lindsay and Leary are vicariously liable under § 1983 for the actions of their agent, police officer O'Connors, Compl. ¶ 5, and (2) that plaintiffs were told that Lindsay, Leary, and defendant Rockefeller were members of the Board of Directors of Provident and had sanctioned the agreement, "leading plaintiffs to believe that contract was valid" [Compl. ¶ 5(h)]. Rockefeller's alleged connection with Provident appears to be plaintiffs' only claim for relief against him. In the absence of any allegation that these three defendants took affirmative action of any kind in connection with the agreement, plaintiffs' contentions, apparently founded solely on the theory of respondeat superior are too thin to sustain a claim for relief against Lindsay, Leary, and Rockefeller. Salazer v. Dowd, 256 F.Supp. 220 (D.Colo.1966); Jordan v. Kelly, 223 F.Supp. 731 (W.D.Mo.1963).

Esveroff was counsel to Palermo but not to Saltzman in the Richmond County trial. His alleged association with the negotiations leading to the agreement was limited to discussions of the Queens County robbery with representatives of the Police Department, the Richmond County District Attorney's office, and Justice Kern [Compl. ¶ 5(a)]. Palermo discharged him as counsel after Palermo had been convicted in the Richmond County trial but before he was sentenced there. (Esveroff Aff. p. 1). Rein and his firm represented Provident in the negotiations which led to the agreement (Bobick Aff. p. 1). Provident was undisputedly the victim of the robbery.

[4, 5] Federal jurisdiction under 42 U.S.C. § 1983 does not extend to all controversies between individual citizens, but only to deprivations of constitutional rights arising

from the actions of persons acting under color of state law, Monroe v. Pape, 365 U.S. 167, 184, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); United States v. Classic, 313 U.S. 299, 326, 64 S.Ct. 1031, 85 L.Ed. 1368 (1941). Since Esveroff, Rein and Provident were not acting under color of state law, jurisdiction under § 1983 is not properly invoked. Brown v. Dunne, 409 F.2d 341 (7th Cir. 1969); Rhodes v. Mayes, 225 F.Supp. 80, 93-94 (D.Neb.1963), affd., 334 F.2d 709 (8th Cir. 1964), cert. denied, 379 U.S. 915, 85 S.Ct. 263, 38 L.Ed.2d 186; Pugliano v. Staziak, 231 F.Supp. 347, 351 n. 5 (W.D.Pa.1964), curiam, 345 F.2d 797 (3d 1965); Jackson v. Hader, 271 F.Supp. 920, 923 (D.M.1967); Pritt v. Johnson, 264 F.Supp. 167 (M.D.Pa.1967); Kregger v. Posner, 248 F.Supp. 804, 806 (E.D.Mich.1966). The motion of Esveroff, Rein and Provident for dismissal are therefore granted.

District Attorney Darrigrand of Oneida County is not alleged to have entered into any agreement with plaintiffs regarding the criminal charge that was pending against them in his county; it is only alleged that certain other defendants would see to it that the charge was dropped (Bobick Aff. p. 1). Darrigrand's failure to drop the charge thus does not give plaintiffs a claim for relief against him, and as to him, the complaint is dismissed.

The portions of the complaint relating to defendants Oswald, Jones, Doe and Roe (the latter two being members of the Parole Board whose names are unknown to plaintiffs) are as follows:

> "g) Plaintiffs were made to believe by Edward Bobick, Esq., and by certain other Respondents that conversations had been held between those Respondents and Respondents Oswald, Jones and other members of the New York State Parole Commission and that said Oswald, et al, stated that Plaintiffs would never be paroled at any time, in any case in New York State unless alleged proceeds of the alleged Queens crime were recovered and further, that if proceeds were recovered through Plaintiffs efforts, Plaintiffs would be paroled after serving 18 months of their sentence." (Compl. ¶ 5(g))

> "9) That contract was not fufilled by Respondents in that Plaintiffs were not released on parole on 17 August 1970 which was the termination date of the 18 month period." (Compl. ¶ 9)

[6-8] Members of the Parole Board act under color of state law and thus may be sued under § 1983 for deprivations of constitutional rights. Although we recognize that in the usual case their decisions require a special competence quite unlike that appropriate in an adversary setting, Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), and their discretionary judgment should not be lightly overturned by a court, parole boards are not immune from suit, United States ex rel. Campbell v. Pate, 401 F.2d 55 (7th Cir. 1968), and when a clear-out deprivation of constitutional rights is alleged, we must assume jurisdiction and, if the claim is proved, not hesitate to act. When a parole board abandons its statutory duty to make its decision on the basis of an independent judgment as to whether release of the prisoner will be in the best interests of the individual and of society, N.Y. Correction Law, McKinney's Consol.Laws, c. 43, §§ 210, 213, in order to further some other goal, as is alleged here, it no longer acts within the prescribed scope of its duties or according to the procedures which it is by law required to follow, and it cannot expect the same measure of deference from the courts.

[9-11] In this case, taking plaintiffs allegations as true, we find that they have stated a claim upon which, assuming it were proved, relief could be granted under § 1983 against the Parole Board. They allege that, prior to enter-

ing into an agreement pursuant to which they entered guilty pleas and gave up their right to a jury trial, direct promises were made by the Parole Board to their attorney that, in exchange for plaintiffs' pleas and for the return of stolen property, they would be released on parole after serving 18 months of their sentences. Following this alleged agreement, the Parole Board refused to grant plaintiffs release on parole at the promised time. Proof of such facts would establish a violation of plaintiffs' Due Process rights. While a plea of guilty, if voluntarily and knowingly made, may not be challenged on grounds which relate to the motivation for the plea, North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) (desire to avoid a possible death penalty); McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (unavailability of constitutional procedures for testing the admissibility of defendant's pretrial statements), it is a fundamental prerequisite of the plea negotiation process that the representations made to the defendant be accurate, and that promises made to him be kept, United States ex rel. Elksnis v. Gilligan, 256 F.Supp. 244 (S.D.N.Y. 1966). The present case is not one in which a defendant who has had the benefit of a plea agreement later seeks to withdraw his guilty plea, cf. Shelton v. United States, 246 F.2d 571 (5th Cir. 1957), but one in which it is alleged that the defendant has kept his part of the agreement and the state has not, cf. United States ex rel. McGrath v. LaVallee, 319 F.2d 308 (2d Cir. 1963), 348 F.2d 373 (2d Cir. 1965); United States ex rel. Elksnis v. Gilligan, *supra*. In this respect, Parole Board members, whose decisions can have such a significant impact on the length of time an individual spends in actual custody, are subject to the same standards of fair play that apply to judges when they participate in plea negotiations. In what we assume to be the rare situation in which they promise release on a certain date, as is alleged here, they cannot

breach such a promise with impunity, cf. United States ex rel. Elksnis v. Gilligan, *supra*,

[12, 13] Turning to the defendants who were intimately involved in the negotiations leading up to the agreement—District Attorneys for Queens and Richmond Counties (Mackell and Braistead) and Various Assistant District Attorneys (Ludwig, DiIorio, Demaskos)—plaintiffs claim generally that they failed to fulfill the plea agreement. Ordinarily, prosecutors acting in their official capacity are entitled to immunity from civil suits, including actions under the Civil Rights Act, based on nonmalicious conduct in their official capacities and within their jurisdiction. Scolnick v. Lefkowitz, 329 F.2d 716 (2d Cir.), cert. denied, 379 U.S. 825, 85 S.Ct. 49, 13 L.Ed.2d 35 (1964); Simons v. O'Connor, 187 F.Supp. 702, 704 (S.D.N.Y. 1960). Public policy protects them against such suits, which might dampen their fervor and inhibit them from zealous performance of their duties. If it were alleged that these prosecutorial defendants had entered into the alleged agreement with knowledge that the agreement would in all probability not be performed, we would be inclined to uphold the complaint on the ground that no compelling justification exists for cloaking them with immunity, since plea agreements touch at the heart of such liberties as are embodied in the presumption of innocence and the right to a jury trial, and public policy accordingly dictates that the conduct of officials entering into such agreements be measured by a high standard of honor, faithfulness and respect for constitutional rights. But see, e. g., Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949). The present complaint however, is limited to a general charge that the defendants failed to fulfill the commitments made, a failure that could have occurred even though they used reasonable diligence, since the power to grant parole rested with the Parole Board and not with the prosecutorial defendants. These allega-

tions are insufficient to pierce the cloak of immunity. Accordingly the complaint is dismissed as to the defendants Mackell, Ludwig, Demaskos, Braistead and DiIorio.

[14] As a member of the Police Department, defendant O'Connors, if the charges against him were proved, could be held liable under § 1983 for violation of plaintiffs' constitutional rights, Monroe v. Pape, *supra*, and he is not protected by the immunity extended to members of the judiciary and public prosecutors.

Plaintiffs have painted their demand for relief with the same broad brush that was used in naming defendants; they seek release from prison, an injunction against further state prosecution (at least as to offenses and charges which were involved in the agreement), return to them of the jewels, damages, etc. In effect, they are asking for the benefits of the agreement which they have not received (i. e., specific performance) or recovery of the rights and property which they gave up in hopes of obtaining those benefits (i. e., rescission). Because issues as to the propriety of certain forms of relief were raised in defendants' briefs, we now take up the elements of relief requested in the complaint.

[15] We do not believe that plaintiffs are entitled to return of the jewelry under any circumstances. While the complaint refers repeatedly to the Provident robbery as an "alleged" robbery [Compl. ¶¶ 4, 5(b), 5(e), 5(f), and 5(j)], plaintiffs admit that at the very least they made contact with "the actual robbers" in order to secure return of the jewelry to Provident [Compl. ¶ 6]. Thus we give no weight to the contradictory assertion found in the following paragraph [Compl. ¶ 7] that ownership of the jewelry was vested in plaintiffs because proof was never made in court that the jewelry had been stolen. As stolen goods, the jewels were not the property of plaintiffs, and under

New York law they are not entitled to employ legal process to recover them, McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 199 N.Y.S.2d 483, 166 N.E.2d 494 (1960); Carr v. Hoy, 2 N.Y.2d 185, 158 N.Y.S.2d 572, 139 N.E.2d 531 (1957).

In light of the foregoing, a complete recision, leaving the parties in the *status quo ante* which prevailed before the agreement, is not possible. Assuming plaintiffs proved their claims, we would be faced with the question of whether they should be limited to partial recision (that is, withdrawal of their guilty plea and perhaps damages) or, in view of the unavailability of complete recision, whether they would be entitled to an order directing the remaining defendants to comply fully with their part of the agreement. In the latter case, as defendants point out, we would be forced to consider whether adequate reason existed for abandoning the traditional reluctance of federal courts to enjoin pending state prosecution, compare Douglas v. City of Jeanette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943) with Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). However, any attempt at this time to resolve the entire question of what relief plaintiffs may finally be entitled to should they prevail would be premature.

On the eve of our filing the foregoing we received a letter dated January 4, 1971, from plaintiff Palermo indicating doubt as to the sufficiency of his complaint and requesting a 30 to 60 day continuance to enable him to amend or modify his claims. Since defendants' motions to dismiss were submitted for disposition more than two months ago and it appears that no valid claim for relief under § 1983 could in any event be stated against certain defendants, we grant the motions to dismiss as to defendants State of New York, City of New York, Kern, Farrell, Lindsay, Leary, Rockefeller, Esveroff, Rein, Rein, Mound & Cotton, Provi-

dent, Darrigrand, Mackell, Ludwig, Demaskos, Braistead and DiIorio without prejudice to plaintiffs' filing an amended complaint within 30 days against such defendants, if any, as to whom plaintiffs are advised, after consultation with their legal counsel, that a valid claim for relief can be stated. The motions of defendants Oswald, Jones, Doe, Roe and O'Connors to dismiss the claims against them are hereby denied.

It is so ordered.